

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**DEBORAH MICKLE**  
Claimant

**APPEAL NO. 10A-UI-08214-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 05/02/10**  
**Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct  
Iowa Code § 96.5(2)(b) - Gross Misconduct  
Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated May 24, 2010, reference 01, which held that Deborah Mickle (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 27, 2010. The claimant participated in the hearing. The employer participated through Carol Mullihan, Asset Protection Coordinator. Employer's Exhibits One through Five were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct or gross misconduct and, if so, whether she was overpaid benefits as a result.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time cashier from August 5, 2008 through April 18, 2010. She was discharged for gross misconduct, which includes theft, and the claimant was responsible for misappropriating \$1,020.00 from the employer. Carol Mullihan, the asset protection coordinator, began investigating a series of cash shortages. She reviewed the transactions and compared those with the surveillance tape, which recorded the same transactions. The final incident occurred on April 8, 2010 and the cash drawer was \$100.00 short. On April 18, 2010, Ms. Mullihan reviewed the surveillance tape of this transaction and saw the claimant take a \$100.00 bill from the register and put it on the counter. Shortly thereafter, the claimant took the bill with her right palm and placed it in her right jacket pocket.

Ms. Mullihan reviewed transactions dating back to February 22, 2010 and discovered numerous transactions during which the claimant misappropriated funds from the employer. On February 22, 2010 she rang up a \$50.00 guest card, put \$1.00 in the drawer and took out the change. She loaded \$50.00 on a guest card on March 3, 2010 without paying for it and took \$100.00 bill out of the cash register on March 4, 2010. She initially set it next the printer but then bent down and picked up the money in her right palm, then put it into her right front pocket. The claimant loaded a \$40.00 guest card without paying for it and took \$50.00 from the cash register on March 9, 2010. On March 12, 2010, she loaded two guest cards for \$20.00 each without paying for them and took out \$150.00 from the cash register. Without paying for it, the claimant loaded a guest card for \$40.00 on March 15, 2010 and in another transaction, she pulled \$50.00 from the cash register. She misappropriated the same amounts on March 17, 2010, when she loaded a \$40.00 gift card without paying for it and took another \$50.00 from the cash register. The claimant loaded a gift card for \$50.00 on March 22, 2010 without paying for it and she took \$20.00 cash out of the cash register. Another \$50.00 gift card was taken on March 31, 2010. She loaded a gift card with \$40.00 on April 4, 2010 but failed to pay for it. The claimant took \$100.00 from a customer and placed it on the counter on April 5, 2010 before eventually putting it in her right front pocket.

The employer interviewed the claimant on April 18, 2010 and she admitted her theft. The claimant provided a written statement to the employer on that date wherein she states that she loaded gift cards and had taken money. The local police were called and the claimant was arrested and taken from the store. She was subsequently convicted of Theft in the Third Degree.

The claimant filed a claim for unemployment insurance benefits effective May 2, 2010 and has received benefits after the separation from employment.

#### **REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Iowa Code § 96.5-2-b-c provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

b. Provided further, If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

An indictable offense is a crime prosecuted by indictment or information. In Iowa, indictable offenses include serious misdemeanors, aggravated misdemeanors, and felonies, all of which are punishable by a fine of more than \$500 and more than 30 days in jail. <http://www.judicial.state.ia.us/wfdata/frame2240-1450/#l>

Iowa Code § 714.2 provides:

1. The theft of property exceeding ten thousand dollars in value, or the theft of property from the person of another, or from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle, or the theft of property which has been removed from a building because of a physical disaster, riot, bombing, or the proximity of battle, is theft in the first degree. Theft in the first degree is a class "C" felony.

2. The theft of property exceeding one thousand dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, "motor vehicle" does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph "b".

3. The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.
4. The theft of property exceeding one hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.
5. The theft of property not exceeding one hundred dollars in value is theft in the fifth degree. Theft in the fifth degree is a simple misdemeanor.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on April 18, 2010 for multiple acts of theft. She admitted in writing that she took cash and loaded gift cards. The claimant was arrested on April 18, 2010 and subsequently convicted of theft in the third degree. The claimant's theft shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case. Additionally, her written admission of theft and subsequent conviction for the same are evidence of gross misconduct. Benefits are denied and wage credits shall be deleted from all employers prior to the date of discharge on April 18, 2010.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The unemployment insurance decision dated May 24, 2010, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for gross misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible, and wage credits shall be deleted from all employers prior to the date of discharge on April 18, 2010. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

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