IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MAMIE L CLARK
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 08A-UI-08577-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/24/08 R: 04
Claimant: Respondent (2-R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 15, 2008, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on October 9, 2008. Claimant participated. Employer participated through Matt Gehant and Brian Drechney.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits and, if so, whether she is overpaid benefits as a result.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time asset protection associate from November 11, 1995 until August 19, 2008, when she was discharged. Claimant stopped two individuals in the parking lot after she saw one of the females open a box of condoms and put them down the front of her pants. A police officer was in the parking lot for another issue and took the two into the loss prevention office, where they denied taking the condoms. The officer declined to hold them for a female officer to search the female suspect because the value of the merchandise was minimal and released them. She had been warned about "non-productive stops" (holding a customer on suspicion of theft but not finding the merchandise on them after they leave the store) in the past and feared this would also be considered a non-productive stop and she would be fired; so when she completed the incident report, she wrote that she had recovered the merchandise when she had only located the empty box. Employer is at risk of legal action from customers held against their will upon suspicion of theft if no stolen merchandise is recovered.

The claimant has received unemployment benefits in the amount of $1,845.00 since filing a claim with an effective date of August 24, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Claimant's falsification of the asset protection stop, indicating she had recovered the merchandise when she had not, was contrary to the employer's best interests in accurate record keeping in case there were legal action taken by a customer who is held on suspicion of having stolen merchandise from the store. Even though the circumstances of the stop would have likely exonerated her, the false report amounted to deliberate misconduct, even in the case of an isolated incident. Benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The September 15, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is potentially overpaid benefits in the amount of $1,845.00.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw