

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

EDWARD H RICHEY
403 S 2ND ST
MARSHALLTOWN IA 50158

WAL-MART STORES INC
C/O THE FRICK COMPANY
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-03697-S2T
OC: 04/18/04 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Edward H. Richey (claimant) appealed a representative's April 1, 2005 decision (reference 03) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Wal-Mart Stores, Inc. (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 28 and May 19, 2005. The claimant participated personally on both days. Due to a clerical error the employer was not called on April 28, 2005. The employer participated on May 19, 2005, by Joseph Eldred, Assistant Manager, and Lance Presley, Senior Vice President of Toxicology at Lab One.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 9, 2004, as a full-time overnight receiving associate. At the end of November 2004, the claimant suffered pain in his groin area after lifting at work. He thought it was a muscle pull. At the end of January 2005, the claimant was diagnosed with a hernia. He reported the incident to the employer. Approximately two weeks later on February 11, 2005, the employer told the claimant to go for a drug screen. The claimant completed his shift at approximately 8:00 a.m. His appointment for the drug screen was at noon.

On February 15, 2005, the laboratory told the claimant over the telephone that he tested positive for marijuana. The claimant told the laboratory there was a mistake because it could not be. The claimant was taking medicine for the hernia pain. The laboratory told the claimant he could have a re-test if he paid \$125.00 within three days. The claimant could not afford the retest. On February 17, 2005, the employer verbally terminated the claimant for failing a drug screen.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

Iowa Code section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. The employer must have the drug screen performed during or immediately before or after a scheduled work period. Iowa Code section 730.5(6). Iowa Code section 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail and the right to obtain a confirmatory test before taking disciplinary action against an employee. Upon a positive drug screen, Iowa Code section 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.” Eaton v. Iowa Employment Appeal Board, 602 N.W.2d at 558.

The claimant was tested four hours after the completion of his shift. The employer failed to give the claimant notice of the test results according to the strict and explicit statutory requirements and failed to allow him an opportunity for evaluation and treatment. The employer did not provide information to the claimant about an employee assistance program or other substance abuse programs as required by Iowa Code section 730.5(9)(c). Benefits are allowed.

DECISION:

The representative’s April 1, 2005 decision (reference 03) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/sc