

**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**

**JOSHUA M CLIFFORD
6901 SE 14TH ST #227
DES MOINES IA 50320**

**WAL-MART STORES INC
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-01412-CT
OC: 01/09/05 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:

Joshua Clifford filed an appeal from a representative's decision dated January 31, 2005, reference 01, which denied benefits based on his separation from Wal-Mart Stores, Inc. After due notice was issued, a hearing was held by telephone on February 24, 2005 at 2:00 p.m. The employer participated by Joe Scavo, Assistant Manager, and Debbie Piercy, Personnel Manager. Exhibits One through Six were admitted on the employer's behalf. Mr. Clifford responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing. He did not return a message left for him until 2:38 p.m. Mr. Clifford was in a hospital with his cell phone off at the time of the hearing. However, he was not at the hospital for any emergency reason. The administrative law judge determined that he

did not establish good cause for not being available at the scheduled time of the hearing. Therefore, the hearing record was not reopened.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Clifford was employed by Wal-Mart from November 14, 2002 until November 29, 2004 as a full-time unloader. He was discharged because of his attendance.

On August 1, 2004, Mr. Clifford failed to report his intent to be absent. All of his remaining absences were properly reported. He was late five times from July 31 through November 15, 2004. The reasons for the tardiness are unknown. Mr. Clifford had a number of absences that the employer considered "unapproved." The specific reasons for the absences are unknown. Mr. Clifford's final absences were on November 27 and 28 and were for unknown reasons. He had been warned about his attendance on November 3, 2004. He was notified of his discharge on November 29, 2004.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Clifford was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from receiving job insurance benefits if he was excessively absent on an unexcused basis. Absences which are for reasonable cause and which are properly reported to the employer are considered excused absences. Tardiness in reporting to work is considered a limited absence from work. In order to support a disqualification from job insurance benefits, the evidence must establish a current act of unexcused absenteeism. See 871 IAC 24.32(8).

As stated previously herein, the employer had the burden of proving misconduct. In this case, this meant establishing that Mr. Clifford was excessively absent on an unexcused basis. Without knowing the reason for an absence, the administrative law judge cannot determine whether it should be considered excused or unexcused. The employer's evidence failed to establish that those absences designated by the employer as "unapproved" were not for reasonable causes. Therefore, the administrative law judge cannot conclude that Mr. Clifford's absences of November 27 and 28 were unexcused. His next most previous attendance infraction was his tardiness of November 15, 2004. This would not be considered a current act in relation to the November 29, 2004 discharge date.

After considering all of the evidence, the administrative law judge concludes that the employer has failed to satisfy its burden of proving disqualifying misconduct. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated January 31, 2005, reference 01, is hereby reversed. Mr. Clifford was discharged by Wal-Mart but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/sc