

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

FATHERLRHMAN H ABDALLAH
4918 DOUGLAS AVE
DES MOINES IA 50310

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

Appeal Number: 05A-UI-00184-S2T
OC: 11/28/04 R: 02
Claimant: Appellant (1)

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:

Wal-Mart Stores (employer) appealed a representative's December 21, 2004 decision (reference 01) that concluded Fatherlrhman Abdallah (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 24, 2005. The claimant participated personally. The employer participated by Kelly Hilton, Personnel Manager, and Harold Harden, Assistant Manager. The employer offered one exhibit, which was marked for identification as Exhibit One. Exhibit One was received into evidence.

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 November 4, 2003, as a part-time produce sales associate. The claimant received a copy of the employer's written drug policy. The policy indicates that an associate must provide a urine specimen within three hours of a work-related accident. English is not the claimant's native language.

On October 4, 2004, the claimant fell at work and injured his lower back. The employer called for an ambulance and the claimant was taken to the emergency room. The claimant was released later that day and given pain killers and muscle relaxers. The medicine made the claimant sleepy. The employer did not request that a urine sample be taken while the claimant was in the hospital and the claimant was unaware of the employer's policy requiring a drug test within three hours of a work-related accident.

On October 5, 2004, the employer telephoned the claimant at 9:30 a.m. and told the claimant he needed to come to work at 1:15 p.m. He would then go to the employer's physician at 2:00 p.m. to take a drug test. The claimant misunderstood the employer's request and thought he was being required to take more computer-based testing. The claimant was tired from the medicine and went to sleep. He was unable to drive while taking the medicine and found someone to take him to work at 2:35 p.m. He was immediately terminated for refusing to take a drug test after injury at work.

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.

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). The claimant was terminated for violating the employer's drug policy. The employer is entitled to perform drug testing after an injury and to discharge if the employee refuses testing. In this case, the employer had the opportunity to order a drug test while the claimant was at the emergency room but did not do so. The following day the claimant was in no condition to drive to work and yet the employer required the claimant to appear. When he could not understand the employer or follow the employer's request because of the medication and his lack of command of English, the employer discharged the claimant. The employer has not proven that the claimant's actions amounted to job related misconduct. Benefits are allowed.

DECISION:

The representative's December 21, 2004 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/sc