

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

CATHERINE S HOOKER
3841 WILKES AVE APT #5
DAVENPORT IA 52806

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

Appeal Number: 05A-UI-06709-RT
OC: 06-05-05 R: 04
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated June 17, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Catherine S. Hooker. After due notice was issued, a telephone hearing was held on July 15, 2005, with the claimant participating. Amy Garstang, Assistant Manager at the employer's store in Davenport, Iowa, where the claimant was employed, participated in the hearing for the employer. Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a full-time sales floor associate from June 1, 2004, until she was discharged on May 26, 2005. The claimant was discharged for poor attendance. In 2005, the claimant had the alleged unapproved absences, unapproved tardies, and unapproved left-earlies as shown on the first page of Employer's Exhibit One. For all of the absences except February 25, 2005, and March 8, 2005, the claimant was absent for personal illness or injury and properly notified the employer of all of her absences. However, the employer does not note the absence as an approved absence unless a doctor's slip is provided. The claimant could not afford to see a doctor when she was ill and, therefore, did not provide the employer doctor's slips. On February 25, 2005, and March 8, 2005, the claimant was off work those days because she had switched her schedule with a co-worker, which switches had been approved by the employer. When the claimant left early, she did so because her work was done and she had permission from co-managers to do so. The claimant could not recall the tardy but the tardy occurred on September 9, 2004. The claimant received three warnings for her attendance, as shown at Employer's Exhibit Two. The employer's attendance policies appear at Employer's Exhibit Three. Pursuant to her claim for unemployment insurance benefits filed effective June 5, 2005, the claimant has received unemployment insurance benefits in the amount of \$710.00 as follows: \$142.00 per week for five weeks from benefit week ending June 11, 2005 to benefit week ending July 9, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is 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).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The parties agree that the claimant was discharged but disagree as to the date. The administrative law judge concludes that the claimant was discharged or at least informed of her discharge on May 26, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny.

The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The employer's witness, Amy Garstang, Assistant Manager at the employer's store in Davenport, Iowa, where the claimant was employed, testified that the claimant had the absences and left earlies in 2005 as shown at page one of Employer's Exhibit One. The one tardy as shown was September 9, 2004. The administrative law judge believes that that is too far removed in time from the claimant's separation to be particularly relevant and notes it was only one tardy. The claimant credibly testified that all of the absences, except for March 8, 2005 and February 25, 2005, were for personal illness or injury and properly reported to the employer. The employer considers any absence even for illness or injury unapproved unless the employee provides a doctor's slip but apparently the employer does not require a doctor's slip. The claimant credibly testified that she was not able to afford to see a doctor and, therefore, could not present doctor's slips. There is no real evidence from the employer that the claimant was not ill on those occasions in which the claimant stated she was ill or injured. Ms. Garstang testified that on one occasion the claimant was seen on a gambling boat, but this is hearsay evidence and the claimant denied that she was on a gambling boat on any day that she was absent for illness. The administrative law judge concludes that all of these absences were for personal

illness or injury and properly reported and are not excessive unexcused absenteeism. Two other absences occurred on February 25, 2005 and March 8, 2005. The claimant credibly testified that although she may have been scheduled to work, she had switched with a co-worker with permission from the employer and had actually been off work those two days. Ms. Garstang testified otherwise, but the administrative law judge concludes that there is not a preponderance of the evidence that the claimant was supposed to work on those two days. Accordingly, the administrative law judge concludes that these two absences were for reasonable cause and proper reporting was not necessary and are not excessive unexcused absenteeism. The claimant testified credibly that she had three left-work-earlies because her work was done and she had permission from co-managers. The administrative law judge concludes that these occasions were for reasonable cause and properly reported and not excessive unexcused absenteeism. In summary, the administrative law judge concludes that the claimant's absences and occasions when she left work early in 2005 were for reasonable cause or personal illness and properly reported or proper reporting was not necessary and are not excessive unexcused absenteeism. It is true that the claimant received three warnings for her attendance as shown at Employer's Exhibit Two, but nevertheless, the administrative law judge concludes, as noted above, that the absences and occasions when she left work early were not excessive unexcused absenteeism.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences and occasions when she left work early were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$710.00 since separating from her employer on or about May 26, 2005, and filing for such benefits effective June 5, 2005. The administrative law judge

further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of June 17, 2005, reference 01, is affirmed. The claimant, Catherine S. Hooker, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/kjw