

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

RUSSELL EWING
UPPER
2116 SOUTH SAINT AUBIN
SIOUX CITY IA 51106

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

Appeal Number: 05A-UI-06270-RT
OC: 05-15-05 R: 01
Claimant: Respondent (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
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 3, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Russell Ewing. After due notice was issued, a telephone hearing was held on July 1, 2005, with the claimant participating. Michael Stiles, Fresh Manager, and Dawn Meier, Business Manager, participated in the hearing for the employer. The employer also had two other individuals sitting in on the hearing but they did not participate in the hearing. Employer's Exhibits One and Two 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 and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time produce associate and merchandiser from May 27, 2004 until he was discharged on August 30, 2005. The claimant was discharged for coming to work and being under the influence of alcohol and for refusing twice to take an alcohol test as required by the employer's policies. The employer has policies, a copy of which the claimant received and for which he signed an acknowledgement, as shown at Employer's Exhibit One, prohibiting coming to work or being at work under the influence of alcohol and refusing twice to take an alcohol test. The employer has an alcohol and drug testing policy that, among other things, provides for an alcohol test and provides for discharge if one twice refuses a test.

On April 30, 2005, the claimant was intoxicated and under the influence of alcohol at work. The claimant could not maintain eye focus and could barely sit in a chair. He had no motor coordination. The claimant's breath and his simple presence smelled of alcohol. The claimant's speech was slurred and he was not coherent. The claimant walked erratically and had to be assisted occasionally in walking. The employer's two witnesses, Dawn Meier, Business Manager, and Michael Stiles, Fresh Manager, personally observed the claimant during this period of time. The claimant was also observed by another employee whose statement appears at Employer's Exhibit Two. Ms. Meier requested that the claimant take an alcohol test and the claimant refused. After further discussions with the claimant, he agreed to go to the hospital and was taken there by Mr. Stiles. During the ride to the hospital, the claimant was incoherent and could not comprehend what had happened just ten minutes earlier. When the claimant arrived at the hospital, he asked for a form for the alcohol test. Mr. Stiles provided the claimant a form and the claimant proceeded to crumple it up. When the claimant was walking to the hospital from the parking lot, Mr. Stiles had to follow the claimant because he was unsteady. When they arrived at the hospital, the claimant left the hospital premises and went outside. Eventually the claimant returned and Mr. Stiles and the claimant went to the emergency room where the alcohol test was to be administered. The claimant was shown into an emergency room. The hospital wanted the claimant to remain in the room but the claimant was repeatedly going in and out. The claimant then proceeded to get loud. The claimant's behavior was such that a nurse at the hospital had to call a security officer. The security officer seemed to calm down the claimant and left. Eventually the nurse arrived to administer the alcohol test and the claimant again left the room and a security officer was called a second time. At that time the claimant refused to take the test. The hospital then would not administer the test. Mr. Stiles called the employer to find out what to do and the employer told Mr. Stiles to return the claimant to the employer and since he refused to test a second time he would be discharged. The claimant was then discharged. Pursuant to his claim for unemployment insurance benefits filed effective May 15, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,302.00 as follows: \$217.00 per week for six weeks from benefit week ending May 21, 2005 to benefit week ending June 25, 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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on April 30, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's two witnesses credibly testified that the claimant was intoxicated and under the influence of alcohol while at work on April 30, 2005. They testified to a number of characteristics demonstrated by the claimant, which indicate intoxication or

influence of alcohol. Their testimony was most credible and was supported by the statement of a third witness, Kim Lindgren, which appears at Employer's Exhibit Two. The claimant denies that he was intoxicated or under the influence of alcohol at work but conceded that he had drunk alcohol the day before. The claimant's testimony that he was not intoxicated is simply not credible. The claimant had little recollection of the events. The claimant stated that he did not remember that a security officer had been twice called to deal with him at the hospital. The employer has policies prohibiting being under the influence of alcohol while at work. The claimant received a copy of these policies and signed an acknowledgement as shown at Employer's Exhibit One. Accordingly, the administrative law judge concludes that the claimant was intoxicated or under the influence of alcohol while at work on April 30, 2005, and that this was a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinced a willful or wanton disregard of an employer's interest and is disqualifying misconduct.

The administrative law judge also concludes that the claimant twice refused an alcohol test. The employer's witnesses credibly testified that the claimant refused two alcohol tests. Even the claimant conceded that he refused at least one. The employer has policies providing for alcohol testing and further providing for discharge upon a second refusal. The administrative law judge concludes that the claimant twice refused an alcohol test and that this refusal was also a deliberate act constituting a material breach of his duties and evincing a willful or wanton disregard of the employer's interest and is also disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$1,302.00 since separating from the employer herein on or about April 30, 2005 and filing for such benefits effective May 15, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of June 3, 2005, reference 01, is reversed. The claimant, Russell Ewing, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,302.00.

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