

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

MICHAEL R GITTINGS
RR 1 BOX 20
LOMAX IL 61454

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

Appeal Number: 04A-UI-08172-RT
OC: 06-27-04 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 July 19, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Michael R. Gittings. After due notice was issued, a telephone hearing was held on August 19, 2004, with the claimant participating. Michael Irwin, Co-Manager of the employer's store in Burlington, Iowa, and Robert Holbert, Assistant Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development 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, the administrative law judge finds: The claimant was employed by the employer as a part-time customer service specialist from August 31, 2000 until he was discharged on June 29, 2004 for poor attendance. The claimant had numerous absences for personal illness as follows: June 14, 2004; April 18, 2004; April 9, 2004; April 3, 2004; April 2, 2004; February 9, 2004; February 2, 2004; January 27, 2004; January 18, 2004; and January 5, 2004. The claimant was also absent on March 19 and 21, 2004, when his grandparent died. The claimant properly reported all of these absences. The employer has a rule or policy that requires that an employee notify the employer of an absence or tardy before the employee's shift. For all of these absences the claimant properly notified the employer. The claimant was also tardy on April 8, 2004; January 6, 2004; January 8, 2004; and January 9, 2004. The claimant did not remember the reasons for these tardies and the employer had no reason for the tardies. Whether the claimant properly reported these tardies is uncertain. The claimant received a written warning for his attendance in October 2003 and a second written warning for his attendance on March 28, 2004. There was no reason why the claimant's last absence was June 14, 2004, but he was not discharged until June 29, 2004. Pursuant to his claim for unemployment insurance benefits filed effective June 27, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,009.00 as follows: \$127.00 for benefit week ending July 3, 2004 (earnings \$56.00); and \$147.00 per week for six weeks from benefit week ending July 10, 2004 to benefit week ending August 14, 2004.

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. He 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, (7) provide:

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).

(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 testified and the administrative law judge concludes that the claimant was discharged on June 29, 2004. 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. IDJS, 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. The employer's witnesses testified to a number of absences the claimant had, as set out in the Findings of Fact. The employer's testimony was that most of these absences were shown as for personal illness. The claimant also confirmed that most of his absences were for personal illness; the only two absences not for personal illness were when his grandparent passed away. The claimant also testified that all of his absences were properly reported to the employer. This is somewhat confirmed by the claimant's manager during part of the time that the claimant was employed, Robert Holbert, Assistant Manager and one of the employer's witnesses, who testified that while he was the claimant's manager he did recall getting calls from the claimant about absences. The claimant also credibly testified that he had a continuing disease, which frequently caused him to be absent and the employer was aware of this disease. Mr. Holbert confirmed that the employer was aware of this disease. Accordingly, the administrative law judge concludes that all of claimant's absences were either for personal illness or other reasonable cause and all were properly reported and are not excessive unexcused absenteeism. The claimant did have four tardies, as set out in the Findings of Fact. The employer did not know why the claimant was tardy on any of those occasions and cannot really specify how tardy the claimant was or whether they were properly reported. The claimant testified the he at least properly reported the tardy on April 8, 2004. On the basis of the record here, the administrative law judge is reluctant to determine that these tardies are not for reasonable cause and not properly reported and therefore excessive unexcused absenteeism. In general, it requires three unexcused absences or tardies to establish disqualifying misconduct. Clark v. Iowa Department of Job

Service, 317 N.W. 2d 517 (Iowa App. 1982). Here, at most, the claimant had four tardies, which might not be for reasonable cause and personal illness. There is no evidence as to how substantial these tardies are and it is unclear whether the claimant properly reported the tardies, but the claimant testified he did properly report at least one of the tardies. On the evidence here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that these tardies were not for reasonable cause and not properly reported. Therefore, the administrative law judge concludes that these tardies are not excessive unexcused absenteeism. It is true that the claimant received two written warnings for his attendance but, as noted above, the claimant's absences and tardies were not excessive unexcused absenteeism. The administrative law judge is also concerned that although the claimant's last absence was June 14, 2004, he was not discharged until June 29, 2004, almost two weeks after his last absence. If the claimant's attendance was so egregious the administrative law judge would conclude that the claimant would have been discharged sooner. The employer had no reasons why there was a delay in the claimant's discharge.

In conclusion, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences and tardies are not excessive unexcused absenteeism and not disqualifying misconduct and, therefore, the claimant 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 the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he 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 \$1,009.00 since separating from the employer herein on or about June 29, 2004 and filing for such benefits effective June 27, 2004. 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 dated July 19, 2004, reference 01, is affirmed. The claimant, Michael R. Gittings, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he 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 his separation from the employer herein

b/kjf