

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

CHERYL A BARRETT
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PO BOX 1
EPWORTH IA 52045-0001

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

Appeal Number: 04A-UI-04612-RT
OC: 03/28/04 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 April 12, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Cheryl A. Barrett. After due notice was issued, a telephone hearing was held on May 17, 2004, with the claimant participating. Cynthia Kase, Assistant Store Manager, participated in the hearing for the employer. 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, the administrative law judge finds: The claimant was employed by the employer as a part-time sales associate from November 4, 2003 until she was discharged on March 19, 2004 for poor attendance. On March 4, 2004, the claimant left work early because of personal illness. Whether this was approved in advance is uncertain. On February 6, 2004, the claimant left work early because of bad road conditions, but whether this was approved in advance is uncertain. On February 25, 2004, the claimant was absent for personal illness and she properly reported this absence. The claimant was also absent on February 5, 2004 for personal illness and again this was properly reported. On January 21 and 23, 2004, the claimant was absent because of car trouble. Whether this was properly reported is not certain. On November 23 and 25, 2004, the claimant was absent for personal illness and these were properly reported. The only warning the claimant received was a verbal warning right after March 4, 2004. The claimant had no other absences or tardies or occasions when she left work early after the verbal warning. The claimant also had numerous approved absences, tardies, and occasions when she left work early which are not relevant here.

Pursuant to her claim for unemployment insurance benefits filed effective March 28, 2004, the claimant has received unemployment insurance benefits in the amount of \$574.00 as follows: \$82.00 per week for seven weeks from benefit week ending April 3, 2004 to benefit week ending May 15, 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. 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), (8) provide:

(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.

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. IDS, 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. At the outset, the administrative law judge notes that the claimant's last attendance difficulty was on March 4, 2004 when she left work early for personal illness and allegedly did not have approval. The only warning the claimant received was an oral warning following this occasion when she left work early. Thereafter, the claimant had no attendance problems until she was discharged on March 19, 2004, two weeks later. The administrative law judge is constrained to conclude that the claimant's discharge was for a past act of attendance and a discharge for misconduct cannot be based on past acts. It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct, but there is no evidence of a current act of misconduct following the claimant's leaving work early on March 4, 2004 and a verbal warning for that. The employer's witness had no explanation why the claimant's discharge was two weeks after the verbal warning. Therefore, the administrative law judge concludes that the claimant was discharged, but not for a current act of misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits.

The administrative law judge also notes that the claimant had the absences and occasions when she left work early which were unexcused as shown in the Findings of Fact. The other absences, tardies and occasions when she left work early were excused and are not excessive unexcused absenteeism and are not relevant here. The occasions when the claimant left work early unexcused were for reasonable cause. The claimant testified that on one occasion, March 4, 2004, she was ill and on February 6, 2004, she left because of bad roads. The claimant testified that she had approval for these occasions, but the employer's witness, Cynthia Kase, Assistant Store Manager, testified otherwise. The administrative law judge must conclude that there is not a preponderance of the evidence that the claimant did not properly report these occasions when she left work early. The other unexcused absences were either for personal illness or for car trouble. All of the personal illness absences were properly reported to the employer, and the employer had no evidence that the claimant was not ill. The claimant did have two absences for car trouble. Again, the claimant testified that she reported these absences, but Ms. Kase denied that. The administrative law judge must conclude that there is not a preponderance of the evidence that these occasions were not properly reported. The administrative law judge understands an occasional but rare tardy or absence for car trouble. Here, the administrative law judge notes that there were two absences following close to each other, but under the circumstances, the administrative law judge is not convinced that these two are not for reasonable cause. Further, three unexcused absences or tardies are generally required to establish disqualifying misconduct. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant would have had only two absences for car trouble. Accordingly, even if the claimant's last occasion when she left work early was not past conduct, the administrative law judge would conclude that claimant's absences and occasions when she left work early were not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, and for all the reasons set out above, 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 the 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 \$574.00 since separating from the employer herein on or about March 19, 2004 and filing for such benefits effective March 28, 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 April 12, 2004, reference 01, is affirmed. The claimant, Cheryl A. Barrett, is entitled to receive unemployment insurance benefits provided she is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

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