

**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**

**CHAD A BROOKHART
605 S JEFFERSON
INDIANOLA IA 50125**

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

**Appeal Number: 04A-UI-10761-RT
OC: 03/14/04 R: 02
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
Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed an appeal from an unemployment insurance decision dated April 9, 2004, reference 03, allowing unemployment insurance benefits to the claimant, Chad A. Brookhart. After due notice was issued, a telephone hearing was held on October 28, 2004, with the claimant participating. Matthew Meyer, Assistant Manager at the employer's store in Windsor Heights, participated in the hearing for the employer. Gayle Woodard of TALX UC eXpress, the representative for the employer, testified about the timeliness of the appeal issue. Department Exhibit 1 and Employer's Exhibit 1 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 Department Exhibit 1 and Employer's Exhibit 1, the administrative law judge finds: An unemployment insurance decision dated April 9, 2004, reference 03, determined that the claimant was eligible to receive unemployment insurance benefits because records indicate that he said he did not voluntarily quit on May 8, 2003 but was discharged and the employer has failed to furnish any information to the contrary and there is no evidence of willful or deliberate misconduct on the part of the claimant. That decision was sent to the employer in care of the employer's representative, TALX UC eXpress, on April 9, 2004 and received by the representative. The representative filed an appeal on April 19, 2004 as shown at Department Exhibit 1. The appeal was mailed to the Appeals Section on the same date as the date of the appeal. However, the appeal section did not receive the appeal. The decision from which the employer sought to appeal indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by April 19, 2004. However, the appeal was never received. On August 9, 2004, the second quarter quarterly statement of charges was sent to the employer and the employer inquired about that by letter dated September 2, 2004 as shown at Department Exhibit 1. This inquiry, or appeal of the quarterly statement of charges, was within the 30 day time period for appealing a quarterly statement of charges.

Because the administrative law judge hereinafter concludes that the employer's appeal was timely, the administrative law judge further finds: The claimant was employed by the employer as a full-time overnight maintenance person from November 27, 2002 until he was separated from his employment on April 30, 2003. On April 30, 2003, the claimant came to work and remarked to his lead person, Rod that he was looking for another job. Rod became angry and told the claimant that he was fired. The claimant called the night manager who said there was nothing he could do and hung up on the claimant. The claimant believed that he was fired and did not return to work thereafter. On May 8, 2003, the claimant came in to get his last check and signed an exit interview as shown at Employer's Exhibit 1, but did not notice that he was signing a voluntary termination but just believed that he was signing documents to enable him to get his last check. The employer believed that the claimant was absent as a no-call/no-show on four scheduled days to work, May 4 through 7, 2003 and was discharged. The claimant never received any warnings or disciplines for his attendance. The employer does have a rule that if an employee is going to be absent or tardy, the employee must call in prior to the employee's shift and inform the employer.

Pursuant to his claim for unemployment insurance benefits filed effective March 14, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,953.08 as follows: \$209.00 per week for 14 weeks from benefit week ending March 20, 2004 to benefit week ending June 19, 2004 and \$27.08 for benefit week ending June 26, 2004. This exhausted the claimant's regular benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal of the decision dated April 9, 2004, reference 03, or, if not, whether the employer demonstrated good cause for such failure. The employer filed a timely appeal of the decision and the appeal should now be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

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

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for the delay in the filing of its appeal. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that its appeal was timely. Employer's witness, Gayle Woodard, of TALX UC eXpress, the employer's representative for unemployment insurance matters, credibly testified that the employer received the decision from which the employer seeks to appeal and that the representative timely filed an appeal of that decision on April 19, 2004 as shown at Department Exhibit 1. Ms. Woodard credibly testified that the decision was mailed the same date as the date shown on the appeal letter. However, this was never received by the Appeals Section. The employer heard nothing more until it received its quarterly statement of charges for the second quarter of 2004 and the employer inquired about those quarterly statement of charges on September 2, 2004, within the 30 days permitted to appeal a quarterly statement of charges. The quarterly statement of charges was sent out to the employer on August 9, 2004. Accordingly, the administrative law judge concludes that the employer's appeal was timely even though it was not received by Workforce Development and even if not timely, the employer demonstrated good cause for a delay in the filing of its ultimate appeal which was the inquiry about the second quarter statement of charges, because it had heard nothing more from Iowa Workforce Development

and the employer believed that it had properly filed its appeal. The employer timely responded to the quarterly statement of charges for the second quarter 2004. Accordingly, the administrative law judge concludes that the employer's appeal was timely and if not timely, the employer has demonstrated good cause for a delay in the filing of its appeal and, therefore, the appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

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.

Both parties testified that the claimant was discharged. They disagree on the date. The claimant testified that he was discharged on April 30, 2003 when his lead man, Rod told him he was discharged. The employer's witness, Matthew Meyer, Assistant Store Manager at the employer's store in Windsor Heights, Iowa, testified that the claimant was discharged on May 8,

2004 when he was absent as a no-call/no-show for four days, May 4 through 7, 2003 and then signed an exit interview as shown at Employers Exhibit 1. The claimant testified that he was discharged by his lead person, Rod, and there is no testimony or evidence to the contrary. This also explains why the claimant was a no-call/no-show for work thereafter. Accordingly, the administrative law judge concludes that the claimant was discharged on April 30, 2003. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct.

It is well established that the employer has the burden to prove disqualifying misconduct. 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. 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). 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, including, excessive unexcused absenteeism. Mr. Meyer testified that the claimant was discharged for four consecutive absences without notifying the employer. However, the claimant credibly testified that he was discharged, or believed he was discharged, on April 30, 2003, and therefore did not return to work thereafter. The claimant also testified that he had never received any warnings or disciplines for his attendance. The administrative law judge must conclude on the evidence here that there is not a preponderance of the evidence that the claimant's absences were not for reasonable cause or personal illness and not properly reported. The claimant had good cause for not showing up to work believing justifiably that he was discharged. Accordingly, the administrative law judge concludes the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct.

The claimant testified that he was actually discharged on April 30, 2003 by his lead person, Rod. The claimant testified that he was discharged because he had spoken to Rod and indicated to him that he was looking for a different job. The claimant did not say that he was quitting. Looking for a different job or informing the employer that one is looking for a different job is not a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor does it evince a willful or wanton disregard of the employer's interests nor is it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. There is no other evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he 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 to receive 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 his 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 \$2,953.08 since separating from the employer herein on April 30, 2003 and filing for such benefits effective March 14, 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 9, 2004, reference 03, is affirmed. The claimant, Chad A. Brookhart, 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.

kjf/tjc