

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

MISTY A LEON-HERNANDEZ  
15 MAPLE ST  
LE MARS IA 51031

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

Appeal Number: 04A-UI-06356-CT  
OC: 05/09/04 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed an appeal from a representative's decision dated May 27, 2004, reference 01, which held that no disqualification would be imposed regarding Misty Leon-Hernandez' separation from employment. After due notice was issued, a hearing was held by telephone on July 7, 2004. Ms. Leon-Hernandez participated personally. The employer participated by Jason Miller, Manager, and Mark Otto, Assistant Manager. Exhibits One through Eight were admitted on the employer's behalf.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Leon-Hernandez was employed by Wal-Mart from January 21, 2003 until May 13, 2004. She was last employed as a sales associate working from 22 to 27 hours each week. She was discharged because of her attendance. On February 4, 2004, she was warned about her attendance. She had been absent a number of times due to either her own illness or that of a child. She had been absent on December 9, 2003 but failed to give notice of the intended absence. She had been late reporting to work on at least five occasions since August of 2003. The warning of February 4 advised that she could be discharged if her attendance did not improve.

On or about May 5, 2004, Ms. Leon-Hernandez was given a "decision-making" day because of continued attendance problems. She had been late reporting to work approximately 12 additional times since the February warning. Her tardiness was usually caused by child care issues. She had also failed to report her absence of April 29. Ms. Leon-Hernandez was notified on or about May 5 that the next level of disciplinary action would be termination if her attendance did not improve. The decision to discharge was based on the fact that Ms. Leon-Hernandez was absent without calling in on May 8 and May 9. Both absences were due to the fact that she did not have child care. She did not call the employer on either day because she did not want to have to talk to Jason Miller, the store manager. She called on May 10 to report that she would be absent due to illness. Her next scheduled day was May 13. She was discharged after working approximately one hour on May 13. Attendance was the sole reason for the discharge.

Ms. Leon-Hernandez has received a total of \$1,126.00 in job insurance benefits since filing her claim effective May 9, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Leon-Hernandez was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from receiving job insurance benefits if she was excessively absent on an unexcused basis. Absences which are for reasonable cause and which are properly reported to the employer are considered excused absences. Tardiness in reporting to work is considered a limited absence from work.

Ms. Leon-Hernandez was warned on February 4, 2004 that her attendance was jeopardizing her continued employment with Wal-Mart. In spite of the warning, she accumulated an additional 12 incidents of tardiness after the warning. The tardiness is unexcused as it was due to a matter of purely personal responsibility, child care. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Ms. Leon-Hernandez also failed to report her absence of April 29 in spite of knowing that her attendance was a problem. The absence is unexcused as it was not properly reported. She had just had a "decision-making" day on May 5 when she failed to report for work or call the employer for two consecutive days, May 8 and May 9. She could have called the employer but chose not to. Therefore, both absences are considered unexcused. Ms. Leon-Hernandez knew from the May 5 warning that the next infraction would result in her discharge. She was not at the workplace to be discharged until May 13.

Ms. Leon-Hernandez' continued failure to conform to the employer's expectations regarding her attendance constituted a substantial disregard of the employer's interests and standards. The 12 incidents of tardiness and the three unexcused absences after the February 4, 2004 warning are sufficient to establish disqualifying misconduct. Accordingly, benefits are denied. Ms. Leon-Hernandez has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code Section 96.3(7).

DECISION:

The representative's decision dated May 27, 2004, reference 01, is hereby reversed. Ms. Leon-Hernandez was discharged by Wal-Mart for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility. Ms. Leon-Hernandez has been overpaid \$1,126.00 in job insurance benefits.

cfc/kjf