

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

PATRICIA KREBS  
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WAL-MART STORES INC  
C/O THE FRICK COMPANY-UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-05128-BT  
OC: 04/16/06 R: 02  
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 – Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated May 3, 2006, reference 01, which held that Patricia Krebs (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 31, 2006. The claimant participated in the hearing. The employer participated through Melinda Moeckly, Personnel Manager and Stephanie Abshire, Assistant Manager.

#### FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed from September 18, 2003 through April 12, 2006, when she was discharged for excessive unexcused absenteeism. She was hired as a part-time associate and became full-time in February 2004. The claimant was most recently a service writer in the Tire, Lube and Express Department. Her last day of employment was March 28, 2006, and she did not return to work after that date because her children were ill. When employees are absent, they are required to contact their supervisors to report the absences. There were no records of the claimant calling in to report her absences. She spoke to the training coordinator on April 7, 2006, and claimed to have called the overnight assistant manager to report her absences. The employer gave her the benefit of the doubt and excused her absences through April 6, 2006.

A phone message was left for the claimant to contact her supervisor, but she failed to do so. The overnight managers were further advised if the claimant called in to report her absences, it was essential the information was passed on to the employer. That was standard policy anyway but since the claimant was alleging she had spoken to the managers and there were no records of her contacts, the employer took additional steps to ensure there was no gap in information. The claimant was a no-call/no-show on April 8, 11, and 12, 2006. She was terminated on April 12, 2006, but did not contact her employer until approximately April 18, 2006. The claimant contacted the employer on that date because she tried to use her employee discount card and it did not work, so she questioned what was happening. When she spoke with the personnel manager, she claimed that she had reported her absences. The claimant was then asked whether she wanted to take a leave of absence and she declined.

The claimant filed a claim for unemployment insurance benefits effective April 16, 2006, and has received benefits after the separation from employment.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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) provides:

(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was advised on April 7, 2006, that she needed to contact her supervisor but failed to do so and was a no-call/no-show for three days after that. Two consecutive no-call/no-show absences can constitute job misconduct. Boehm v. IDJS, (Unpublished, Iowa App. 1986). The claimant contends that she called in to report her absences every day for the two-week period, but it is extremely unlikely that the employer would have no record of her calling in for that length of time, if she had indeed called.

The claimant testified that she has cell phone records to prove she called the employer but failed to provide that evidence. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The claimant stated that she was not aware until today's date that the employer had no record of her calling but the evidence indicates otherwise, as she was questioned about calling in when she spoke with the training coordinator on April 7, 2006. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated May 3, 2006, reference 01, is reversed. Claimant Patricia Krebs is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,365.00.

sdb/kjw