

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

JOSHUA S LEMON  
2787 SHAMROCK DR  
MUSCATINE IA 52761

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

Appeal Number: 05A-UI-01056-RT  
OC: 01/02/05 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, 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 Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated January 21, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Joshua S. Lemon. After due notice was issued, a telephone hearing was held on February 15, 2005, with the claimant participating. Dawn Walsh, Assistant Manager at store number 559 in Muscatine, Iowa, 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 full-time unloader from February 24, 2004 until he was discharged on November 29, 2004. The claimant was discharged for poor attendance. On November 26, 2004, the claimant was absent as a no-call/no-show when he misread the schedule and did not believe that he was to work that night. A schedule is posted and employees are instructed to note the schedule as posted. Either the claimant failed to note the schedule or noted it incorrectly, but in any event did not show up for work even though he was scheduled to work that day. The claimant did not properly report his absence. The claimant had numerous other absences as follows: September 15 and 19, 2004; August 23, 2004; June 6, 2004; May 21, 2004; April 23 and 24, 2004; March 8, 12, 19, 2004. All of these absences were properly reported and excused by the employer. The only absence not properly reported and not excused by the employer was the absence on November 26, 2004. The claimant received no warnings or disciplines for his attendance. The only reason for the claimant's discharge was his attendance. The claimant had no tardies.

Pursuant to his claim for unemployment insurance benefits filed effective January 2, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,194.00 as follows: \$199.00 per week for six weeks from benefit week ending January 8, 2005 to benefit week ending February 12, 2005.

#### 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.

Both parties agree that the claimant was discharged on November 26, 2004. However, both parties seem to agree that the claimant was absent that day so could not have been discharged until November 29, 2004. Accordingly, the administrative law judge concludes that the claimant was discharged on November 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, namely, excessive unexcused absenteeism. At the outset, the administrative law judge must state that it appeared that each party was bent on losing the case. If the claimant is to be believed, he had six absences because he misread the schedule and another absence because he didn't read the schedule and had to call in and was informed that he was not on the schedule. The claimant also testified that four absences were not properly reported. The administrative law judge would have to conclude that these absences were not for reasonable cause and not properly reported and were excessive unexcused absenteeism. However, the claimant is not credible. He testified that he properly reported absences when he misread the schedule and didn't believe he was to work. The claimant had no response as to why he would properly report these absences if initially he did not believe he even had to work. The administrative law judge concludes that the employer's witness, Dawn Walsh, Assistant Manager, was more credible. She credibly testified from the employer's records and indicated that all absences prior to November 26, 2004, were properly reported and were approved by a manager. It appears that these absences were all excused by the employer. Therefore, the administrative law judge is constrained to conclude that these absences were for reasonable cause and properly reported and not excessive unexcused absenteeism. The only remaining absence is the absence on November 26, 2004. Both parties agree that the claimant was absent that day. Ms. Walsh credibly testified that the claimant was on the schedule to work but didn't work. She was also credible when she testified that the schedule for the employer is always posted and that the employees are instructed to read the schedule and comply with the schedule in terms of workdays. She was also credible in her testimony that the claimant would not have access to check the computer for the schedule. Finally, Ms. Walsh testified from employer's records, which is more reliable, at least here, than the claimant's memory. Accordingly, the administrative law judge concludes that the claimant had one absence that was not for reasonable cause and not properly reported. However, one absence does not establish excessive unexcused absenteeism. The term itself implies more than one absence and generally it requires three unexcused absences to establish excessive unexcused absenteeism. See for example Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant only had one. Finally, Ms. Walsh credibly testified that the claimant never received any warnings or disciplines for his attendance. Accordingly, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not 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 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 credible evidence of substantial misconduct 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 \$1,194.00 since separating from the employer herein on or about November 29, 2004 and filing for such benefits effective January 2, 2005. 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 January 21, 2005, reference 01, is affirmed. The claimant, Joshua S. Lemon, 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