

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

TRACY L KINLEY FISHER
4406 N DIVISION ST
DAVENPORT IA 52806

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

Appeal Number: 04A-UI-08746-AT
OC: 07-11-04 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

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from an unemployment insurance decision dated August 3, 2004, reference 01, which allowed benefits to Tracy L. Kinley Fisher. After due notice was issued, a hearing was held in Davenport, Iowa on October 21, 2004 with Store Manager Anthony Ciabattone participating for the employer. Exhibit 1 was admitted into evidence. The claimant did not respond when paged at the time of the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Tracy L. Kinley Fisher was employed by Wal-Mart Stores, Inc. from September 2002 until she was discharged July 13, 2004. She last worked as a customer service manager. The final incident leading to the discharge was Ms. Fisher's absence due to illness on June 24, 2004. She properly reported the absence to the employer. She had been absent due to illness many times in the past.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that Ms. Fisher was discharged for disqualifying misconduct. It does 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.

Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). On the other hand, absence due to illness properly reported to the employer cannot be held against any individual for unemployment insurance purposes. See Higgins and 871 IAC 24.32(7). Furthermore, disqualification following a discharge is appropriate if, and only if, the final incident leading directly to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8).

Applying these principles of law to the evidence in this record, the administrative law judge concludes that benefits must be allowed. First of all, the final incident was an absence due to illness properly reported to the employer. In addition, the evidence establishes that most, if not all, of the prior absences had also been for illness and had been reported to the employer. Under these circumstances no disqualification may be imposed.

DECISION:

The unemployment insurance decision dated August 3, 2004, reference 01, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

dj/kjf