

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

TRAVIS P DOHERTY
1804 S 7TH AVE E APT 4B
NEWTON IA 50208

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

Appeal Number: 04A-UI-08312-RT
OC: 06-20-04 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, 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

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated July 21, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Travis P. Doherty. After due notice was issued, a telephone hearing was held on August 23, 2004, with the claimant participating. Michael Augustine, former co-manager of the store in Newton, Iowa, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. Employer's Exhibits 1 and 2 were admitted into evidence.

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 August 5, 2003 until he was discharged for inappropriate conduct in the workplace, including violations of the employer's harassment/discrimination/inappropriate conduct policy. This policy appears at Employer's Exhibit 1. It also appears in the employee's handbook, a copy of which the claimant received and for which he signed an acknowledgement. The claimant was fully aware of this policy. In June 2004, while four people were working together, two of them female ICS employees, the claimant and another male associate were having a conversation about a sexual experience of the claimant. The claimant's conversation with the associate was graphic. The two female employees overheard this conversation and complained to the employer. An investigation was conducted and the claimant admitted that he had had such a conversation. The claimant was then discharged. Previously, the claimant had received a verbal warning with a written record on February 24, 2004 for inappropriate behavior and inappropriate remarks, including kissing a former female associate. The claimant also received a written warning on May 7, 2004 for rude remarks and creating a hostile workplace. Both warnings appear at Employer's Exhibit 2. The claimant was aware that the employer was concerned about his behavior. Pursuant to his claim for unemployment insurance benefits filed effective June 20, 2004, the claimant has received unemployment insurance benefits in the amount of \$561.00 as follows: \$187.00 per week for three weeks, from benefit week ending June 26, 2004 to benefit week ending July 10, 2004.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 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).

Both witnesses testified, and the administrative law judge concludes, that the claimant was discharged on June 21, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Michael Augustine, former co-manager at the Newton, Iowa store, where the claimant was employed, credibly testified that in June 2004 the claimant had an inappropriate conversation with a male co-worker about one of the claimant's sexual experiences, which conversation was graphic, and that this conversation occurred in the presence of female coworkers. The claimant concedes that he had such a graphic conversation with a male associate in the presence of two female coworkers who were ICS workers. One of the female workers complained to the employer and the employer conducted an investigation and the claimant conceded to the conversation and was discharged. This conversation followed closely after two warnings. On February 24, 2004, the claimant received a warning for inappropriate behavior and remarks with a coworker and on May 7, 2004 a written warning for rude remarks creating a hostile workplace. Both warnings are shown at Employer's Exhibit 2. The employer has a clear policy prohibiting harassment and discrimination and inappropriate conduct, as shown at Employer's Exhibit 1, and the claimant was fully aware of this policy. Because of the claimant's awareness of the policy and the previous warnings, the administrative law judge concludes that the claimant's graphic explicit discussion with a coworker of a sexual experience in the presence of female coworkers is a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of an employer's interest and, at the very least, is carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$561.00 since separating from the employer herein on or about June 21, 2004 and filing for unemployment insurance benefits effective June 20, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated July 21, 2004, reference 01, is reversed. The claimant, Travis P. Doherty, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$561.00.

b/b