

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

BRYAN A PAUL
111 MARIE AVE
NORTH SIOUX CITY SD 57049

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

Appeal Number: 04A-UI-01461-RT
OC: 12-14-03 R: 01
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 for Misconduct
Section 96.5-1 – Voluntarily Quitting
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 February 4, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Bryan A. Paul. After due notice was issued, a telephone hearing was held on March 3, 2004, with the claimant participating. The claimant's wife was available to testify but not called because her testimony was unnecessary and would have been repetitive. Eric Joly, Personnel Manager, participated in the hearing for the employer. Employer's Exhibits 1 through 5 were admitted into evidence. 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, including Employer's Exhibits 1 through 5, the administrative law judge finds: The claimant was employed by the employer as a full-time overnight maintenance associate from July 15, 2002 until he separated from his employment on January 29, 2003. The claimant was absent from work on January 24, 25, and 26, 2004 because of personal illness. On each of those days the claimant called and spoke to a different manager or associate when a manager was absent and informed them that he was not going to be at work. The claimant then believed that he was not scheduled on January 27 and 28, 2003 and therefore was absent those days and did not inform the employer. When the claimant came in on January 29, 2003 he was informed that he had been terminated. The employer believed that the claimant had been absent all of those days as a no-call/no-show and according to the employer's policy, since he had three consecutive absences as a no-call/no-show, he was voluntarily terminated. The employer has a rule or policy, as shown at Employer's Exhibit 1, that requires that an employee who is going to be absent or tardy notify a member of management at least one hour prior to the employee's shift and that further, three consecutive absences as a no-call/no-show are considered a voluntary termination.

The claimant had additional absences and tardies, as shown at Employer's Exhibit 2. Two absences were recorded as no-call/no-shows on January 10 and 17, 2003 and again on December 1 and 2, 2002. All of the other absences were for illness or other reasonable cause and properly reported to the employer. Beginning on or about December 1, 2003 a co-worker, Allan Bacon, began changing the schedule. Although the claimant was not sure that Mr. Bacon had such authority, the claimant assumed that he did from management and assumed that the scheduling changes were necessary. However, because of the scheduling changes the claimant was never sure when he was scheduled to work and was absent on days that he believed he was not scheduled and did not call in. He informed the employer of these matters when he was given a coaching for improvement form on December 3, 2002 but the scheduling problems persisted. All of the claimant's tardies were on Saturday and he was tardy because the store was so busy that he was told to come in one hour later to perform cleaning so that he would not interfere with the customers. The claimant received only one warning for his attendance, which is the coaching for improvement form shown at Employer's Exhibit 3. The claimant did express concerns to the employer about the scheduling but expressed no other concerns to the employer about his working conditions. The claimant never indicated or announced an intention to quit if any of his concerns were not addressed. Pursuant to his claim for unemployment insurance benefits filed effective December 14, 2003, the claimant had received at least unemployment insurance benefits in the amount of \$1,539.670 as follows: \$142.00 per week for ten weeks from benefit week ending December 20, 2003 to benefit week ending February 21, 2004 and \$119.67 for benefit week ending February 28, 2004, which exhausted claimant's benefits.

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 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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) 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).

(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 first issue to be resolved is the character of the separation. The employer maintains that the claimant quit voluntarily when he was absent for five days as a no-call/no-show from January 24, 2003 to January 28, 2003. The claimant maintains that he was discharged when he returned to work on January 29, 2003 and was informed that he had been terminated. Although it is a close question, 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 left his employment voluntarily. The fact that the claimant returned to work on January 29, 2003 indicates that the claimant did not believe that he had quit. Further, the claimant credibly testified that for the first three days of his absences when he was ill he properly reported each to the employer and specifically named the name of a person with whom he had spoken and each was employed at the time that he called. The claimant then credibly testified that he believed that he was not on the schedule for the two remaining days and therefore did not call in. The employer's witness, Eric Joly, Personnel Manager, credibly testified at the hearing. However, his testimony does not really contradict the claimant's. Mr. Joly testified that the first he heard of the scheduling problem was at the hearing. However the claimant had mentioned that scheduling problem at fact-finding and so the claimant's testimony was consistent. Mr. Joly referred to employer's Exhibit 5, which indicates that Heather Brosamle did not take a phone call from the claimant during the week in question showing the number "76" in each space for the claimant's absence, meaning that the claimant was a no show. However, this does not prove that the claimant did not call Ms. Brosamle or anyone else. Ms. Brosamle may have failed simply to put down on the chart the day that the claimant testified he called her on January 24, 2003. Further, the claimant testified that he called others on the other two days, January 25, and 26, 2003. Finally, the administrative law judge notes that on Employer's Exhibit 3 the claimant, on December 3, 2002, stated that there was a scheduling problem and so the claimant's testimony about the scheduling problem is and has been consistent. This is a close question, but the administrative law judge must conclude on the evidence here that there is not a preponderance of the evidence that the claimant left his employment voluntarily. Therefore, the administrative law judge concludes that the claimant was discharged.

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. Iowa Department of Job Service, 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. Although it is a close question, 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. As noted above, the claimant's testimony is credible. The claimant testified that his absences were for personal illness or for difficulties with his schedule when he believed truly that he was not on the schedule. The claimant's testimony was consistent and related to all of the absences that the employer shows that were no-call/no-shows for absences that the claimant failed to properly report to the employer. Most of the other absences that the claimant had were for personal illness and all of the other absences were properly reported to

the employer, other than those that appear on Employer's Exhibit 2 as a "no-show." The claimant also credibly explained that the tardies were all on Saturdays when he was told to come late because the store was busy and his cleaning would interfere with the customers. Almost all of the tardies shown on Employer's Exhibit 2, were for Saturdays. Finally, the administrative law judge notes that the claimant only received one warning, a coaching for improvement form on December 3, 2002, and thereafter, the claimant had a reasonable explanation for his absences. A discharge for absences prior to December 3, 2002 would be for past conduct and a discharge for misconduct cannot be based on past acts. It is true that past acts and warnings can be used to determine the current act of misconduct but here the administrative law judge concludes that there were no current acts of misconduct and, further, the claimant only received one warning.

Accordingly, and for all the reasons set out above, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's absences and tardies were not for reasonable cause and not properly reported and, therefore, the administrative law judge concludes they were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for 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, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (app. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his 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 at least in the amount of \$1,539.67 since separating from the employer herein on or about January 29, 2003 and filing for such benefits effective December 14, 2003. 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 of February 4, 2004, reference 02, is affirmed. The claimant, Bryan A. Paul, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

dj/b