

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JASON L BATES

Claimant

APPEAL NO. 09A-UI-04400-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 02/15/09

Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 19, 2009, reference 01, that concluded he was discharged for misconduct. A telephone hearing was held on April 14, 2009. The parties were properly notified about the hearing. The claimant participated in the hearing with a witness, Ashlee Avrill. Alison Dempsey, attorney at law, participated in the hearing on behalf of the employer with a witness, Kerry Osgerby. Exhibits A and B and One through Seven were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked as a sales associate for the employer 32 to 40 hours per week from June 1, 2006, to February 19, 2009. The claimant was informed and understood that under the employer's work rules, regular attendance was required and employees were required to notify the employer if they were not able to work as scheduled. Employees who have seven attendance occurrences in a six-month period are subject to discharge.

The claimant had received a written coaching on December 14, 2008, for not completing his work in a timely manner. On February 1, 2009, the claimant was given a decision-making day, which is the last step in the employer's disciplinary policy, for having nine attendance occurrences. These occurrences included times he was late for work, left work earlier, and was absent from work without proper notice to the employer. He was warned that he would be discharged for another unapproved absence.

The claimant suffers from epilepsy and migraine headaches. He had his doctor complete an intermittent leave request under the Family and Medical Leave Act (FMLA) in July 2008, in which his doctor certified that the claimant might need to be absent from work for 4 to 48 hours after a seizure or migraine headache. When he received the decision-making day, the employer notified the claimant that a new doctor's certification was needed. The claimant got a new certification from his doctor on February 4, which reiterated that he would intermittently

need to be absent after a seizure or migraine. The claimant submitted this to the employer. Additional work restrictions were imposed by his doctor on February 13, including allowing a five-minute break for the claimant to take medication, limited intense physical activity to 30 minutes, and no work after 10:00 p.m.

The claimant was late for work on February 5, 6, 7, and 15. He believes but is not sure that he was late due to migraine headaches. He never informed the employer that he wanted intermittent leave under FMLA. The claimant also left work early on February 6 for unknown reasons. The employer considered him to have taken an unauthorized break on February 13 when he took an evening break within a half hour of his lunch break. He did this because he took a late lunch because of staffing needs in his department.

After reviewing the claimant's attendance record, the employer discharged the claimant on February 19, 2009, for excessive absenteeism after he had received his decision-making day and final warning.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code section 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

871 IAC 24.32(7) provides that 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 claimant was given a last warning about his absences and tardiness and continued to arrive late for work. The claimant believes but is not sure that the lateness was due to illness, yet he never reported that this was the reason for the tardiness under the intermittent leave of absence form. Work-connected misconduct has been shown in this case.

DECISION:

The unemployment insurance decision dated March 19, 2009, reference 01, is affirmed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs