

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBBIE JO RAGAN
Claimant

APPEAL NO: 09A-UI-09074-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 05/03/09
Claimant: Respondent (2/R)

Iowa Code section 96.5(2)(a) - Discharge for Misconduct
Iowa Code section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated June 12, 2009, reference 02, which held that Debbie Jo Ragan (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 13, 2009. The claimant participated in the hearing. The employer participated through Suzanne O'Reilly, Vision Center Manager. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed full-time from July 28, 1998 through May 11, 2009. She began work as an optician and then became a human resource manager. The claimant subsequently transferred to the Altoona, Iowa store on December 21, 2008 as an optician. The employer's attendance policy provides an employee is considered a voluntary quit if she is a no-call/no-show for three consecutive workdays. The claimant was a no-call/no-show for three consecutive workdays ending on May 11, 2009.

When employees are absent, they are required to call an 800-number to report their absences and they are given a confirmation number. Additionally, when an employee in the vision center was going to be absent, the employee would also call Vision Center Manager Suzanne O'Reilly's cell phone. The claimant transferred to the Altoona store with a pre-existing verbal warning for attendance which was still in effect. Ms. O'Reilly issued her a written warning for attendance on April 30, 2009.

The claimant worked on May 1, 2009 but was a no-call/no-show on May 2, 2009. She had the next day off but when she returned on May 4, 2009 she was given a decision-making day, which

is essentially a one-day suspension and final warning. The claimant was not scheduled on May 5, 2009 but was a no-call/no-show on May 6, 2009. She was not scheduled on May 7, 2009 and was again a no-call/no-show on May 8, 2009. She had the weekend off work and was next scheduled on Monday, May 11, 2009. The claimant was again a no-call/no-show on May 11, 2009 and was terminated for job abandonment on that date.

The claimant filed a claim for unemployment insurance benefits effective May 3, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if she voluntarily quit without good cause attributable to the employer or if the employer discharged her for work-connected misconduct. Iowa Code sections 96.5-1 and 96.5-2-a.

The employer considers the claimant quit her employment effective May 11, 2009 when she failed to return to work. The claimant contends she was discharged for attendance on May 8, 2009 after she was late for work when she had just been given a decision-making day for attendance on May 7, 2009. Although the employer's testimony was found more credible, the claimant's contention that she was discharged will be relied upon.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for excessive unexcused absenteeism on May 11, 2009 after she was a no-call/no-show for three consecutive workdays. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Id. The claimant knew her job was in jeopardy because she had been given two warnings and a one-day suspension for attendance prior to her three days of no-call/no-show.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absences were not excused. The final absences, in combination with the claimant's history of absenteeism, are considered excessive.

The claimant's version of the facts is somewhat different but the outcome is the same. She admits she was given a decision-making day for attendance, which is the final disciplinary step before termination. However, she contends she had the decision-making day on May 7, 2009 and was discharged on May 8, 2009 when she was late for work. The claimant contends she was late for work because of new medication she was taking. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant did not call the 800-number or the vision center manager's phone number to report her absence. Furthermore, she does not remember with whom she spoke but was reportedly told by this unknown person that she no longer had a job. Even if the claimant's final absence was due to illness, it was not properly reported and was therefore, unexcused. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated June 12, 2009, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css