

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELLEN M O'DONNELL
Claimant

APPEAL NO. 12A-UI-03740-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 02/12/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated April 2, 2012, reference 01, which denied unemployment insurance benefits. After due notice was issued, a telephone hearing was held on April 25, 2012. The claimant participated. The employer participated by Ms. Natalie Benard, assistant manager. Employer's Exhibits 1, 2, 3, and 4 were received into evidence.

ISSUE:

At issue is whether the claimant was discharged for disqualifying misconduct.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ellen O'Donnell was employed by Wal-Mart Stores from October 24, 2009, until August 8, 2011, when she was discharged from employment. Ms. O'Donnell worked as a part-time cashier and was paid by the hour. Her immediate supervisor was Natalie Benard.

The claimant was discharged when she exceeded the permissible number of attendance infractions by calling in ill on July 27, 2011, and leaving work early due to illness on July 30, 2011. On both occasions, Ms. O'Donnell provided required notification to the employer about her impending absences.

The employer was aware that Ms. O'Donnell had ongoing health problems caused by diabetes and that her medical condition, at times, caused the claimant to be absent from work. The employer had allowed the claimant a number of absences in excess of those allowed to other employees because of her medical condition.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. 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.

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 of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Conduct that may be serious enough to warrant discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that excessive unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused. The Court further held, however, that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer.

Inasmuch as the evidence in the record establishes that the claimant's most recent attendance infractions were due to illness and were properly reported, the administrative law judge

concludes that the claimant was not discharged for intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated April 2, 2012, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw