

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ROBERT R NEWCOMB
Claimant

APPEAL NO. 18A-UI-07314-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 06/10/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Robert Newcomb (claimant) appealed a representative's July 2, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Walmart (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 25, 2018. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on May 13, 2017, and at the end of his employment he was working as a part-time fresh produce cleaner. He signed for receipt of the employer's handbook on May 13, 2017. The handbook indicated that employees who accumulated nine attendance points would be terminated.

The employer treated employees disparately. One employee, Linda, clocked out one minute early and was assessed one-half point. She asked the employer to reconsider and the employer removed the one-half point from her record. Another employee, Delia, had her point totals reduced twice so she could continue to work for the employer.

In January or February 2018, the employer issued the claimant a warning for accumulating 8.5 attendance points. The claimant clocked out one minute early and was assessed one-half point. He asked the employer to reconsider and the employer refused to remove the one-half point from his record. He was assessed eight points for absences that were properly reported. He was absent four days to take his girlfriend to the hospital. The claimant was absent two days when his father was in the hospital and having surgery. He was absent two days when the claimant was ill.

On June 2 and 5, 2018, the claimant properly reported his absence due to illness. He had diarrhea, a fever, and was vomiting. The claimant was not scheduled to work on June 3 and 4, 2018. He returned to work on June 6 and 7, 2018. On June 8, 2018, the employer terminated the claimant for accumulating ten attendance points. The employer did not reconsider the claimant's request to recalculate his total points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. 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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incidents of absence were properly reported illnesses which occurred on June 2 and 5, 2018. The claimant's absences do not amount to job misconduct because they were properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's July 2, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs