

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

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WAL-MART STORES INC
C/O THE FRICK COMPANY-UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-05867-ET
OC: 05-08-05 R: 02
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/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 25, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 21 2005. The claimant participated in the hearing. Kelly Hilton, Personnel Manager, and Patricia Danylchuck, Assistant Manager, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time overnight stocker for Wal-Mart from November 4, 2003, to May 6, 2005. The claimant called the employer April 28 and April 29, 2005, and reported her son had strep throat and she would not be in. She was not scheduled April 30 or 31, 2005. On May 1, 2005, she started to get sick herself and went to her doctor May 2, 2005, and was told she also had strep throat, a sinus infection and lung congestion, and she should not work for the rest of the week. The claimant called Personnel Manager Kathy Hilton to report her absence, and Ms. Hilton suggested she come in and pick up the paperwork for a leave of absence. The claimant felt too ill to come in and later called the support manager that night and told her she would be out the rest of the week. Becky said she would let the night assistant manager know. On May 3, 2004, the claimant called the personnel office and talked to Kim. The claimant said she was too sick to come in and get the papers for the leave of absence, but Kim indicated she could fax the paperwork to her physician. The claimant provided her doctor's fax number. The claimant called in that night and talked to Lenore, a night manager, and explained the situation. On May 4, 2005, the claimant called Ms. Hilton to see if her physician had faxed in the paperwork. Ms. Hilton said no, so the claimant called her doctor's office and was told her doctor would not be in until later that week. The claimant called Ms. Hilton back and explained the situation. The claimant did not call in that night to report her absence because she believed everyone was aware of the situation, as she had spoken to both the day and night shift supervisors at that point. The claimant called the employer May 5, 2005, to ask if her doctor had faxed the papers in yet. The employer said he had not, but she could refax the papers to her doctor's office. The claimant did not call in that evening to report her absence to the nightshift supervisor. On May 6, 2005, the claimant called and talked to Ms. Hilton. The claimant said she would be back on Monday and asked if her doctor sent her paperwork in yet. Ms. Hilton said no. The claimant called her doctor's office and they said they would get to it that day. The claimant called Ms. Hilton back and gave her that information. Later that night the claimant called Lenore and said she would be back May 9, 2005. On May 9, 2005, the claimant called in and asked Ms. Hilton what kind of release she needed to return. Ms. Hilton said she had not received the leave of absence papers. The claimant asked what that meant and whether she still had a job. Ms. Hilton put her on hold, then came back and said the claimant had been terminated the previous week for being a no-call/no-show. The claimant asked if she could still go get her leave of absence papers and turn them in. Ms. Hilton said no.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

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).

871 IAC 24.32(7) provides:

(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 employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for a final absence May 6, 2005. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The claimant's previous absences were due to illness and were properly reported. 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). Although the employer claims the claimant did not report her absences, the employer was aware the claimant requested a medical leave of absence. The claimant testified that she maintained nearly daily contact with the employer and her testimony is credible. The administrative law judge concludes the claimant properly reported her absences due to illness. Consequently, the employer has not met its burden of proving disqualifying job misconduct. Benefits are allowed.

DECISION:

The May 25, 2005, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/kjw