

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAULA V GOERDT

Claimant

APPEAL NO. 16A-UI-11636-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 10/02/16

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc., the employer, filed a timely appeal from a representative's decision dated October 17, 2016, reference 01, which held claimant eligible to receive unemployment insurance benefits finding the claimant was dismissed from work on September 28, 2016 for excessive absences but finding the absences were due to illness and were properly reported. After due notice was provided, a telephone hearing was held on November 10, 2016. Although duly notified, the claimant did not participate. The employer participated by Ms. Margret Neilson, Human Resource Coordinator, and Ms. Jasmine Butler, Assistant Manager/Groceries. Employer's Exhibits A, B, C, D, and E were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Paula Goerdts was employed by Wal-Mart Stores, Inc. from November 8, 2003 until September 28, 2016 when she was discharged for exceeding the permissible number of attendance infraction points under the company's attendance point policy. Ms. Goerdts was employed as a full-time produce department sales associate and was paid by the hour. Her immediate supervisor was Frank Johnson.

Ms. Goerdts was discharged on September 28, 2016 after she had accumulated nine attendance infraction points within a six-month period and was subject to discharge under the company's "no fault" attendance policy. Under the terms of the policy, employees are assessed one infraction point for each day's absence and are assessed one-half point for arriving late or leaving early within time limits set by the employer. Arriving late or leaving early for a significant portion of a work shift results in an employee being assessed a full infraction point. Employees who fail to provide notice of impending absences are assessed two additional infraction points for each occurrence. The oldest occurrence rolls off after a six-month period. Employees are expected to check their point level by accessing computer records available to them. Although

not required to do so by policy, it appears that the employer warned Ms. Goerdt about the attendance infraction points she was accumulating in July and also on September 2, 2016.

The claimant called off work ill on March 28 and March 30, 2016 and was assessed one infraction point for each absence. In July 2016, Ms. Goerdt had been authorized to take some time away from work to visit a sick relative in the state of Texas but did not return to work by July 4, 2016, the date agreed to by Ms. Goerdt and her employer. Ms. Goerdt was assessed five infraction points for her absences on July 4, 5, 6, 7, and 8, 2016. On September 2, 2016, Ms. Goerdt called off work due to illness. The final infraction that caused the claimant's discharge took place on September 21, 2016. On that date, the claimant reported to work but was unable to work due to illness. Ms. Goerdt informed an assistant manager that she was ill and unable to work that day.

Company policy requires employees who are calling off work to call a specified 1-800 number to report their impending absence. The call to the 1-800 number then rolls over to the local Wal-Mart store's facility where the employee works and the employee is expected to verbally inform a management person at that location of their impending absence to facilitate staffing by the local Wal-Mart store. Ms. Goerdt was initially assessed three infraction points for her absence on September 21, 2016 because she had not called the 1-800 number. After further consideration, however, the employer reduced the infraction points assessed on September 21, 2016 to one point because the claimant had directly notified management at the facility where she was employed that day.

Upon Ms. Goerdt's return to work after being absent without authorization from July 4, 2016 through July 8, 2016, the employer offered Ms. Goerdt the option of a retroactive leave of absence to cover those dates. Ms. Goerdt declined the offer although she was aware that the infraction points would have been removed, if her absences were categorized as absences due to a leave of absence. It is the employer's belief that the claimant could have minimized her number of infractions in a rolling six-month period if she had elected to request a retroactive leave of absence.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if the employee is discharged for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. 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 propriety of a discharge is not at issue in unemployment insurance matters. An employer may be justified in discharging an employee, but the employee's conduct may not have amounted to misconduct sufficient to warrant the denial of unemployment insurance benefits. The law limits disqualifying misconduct to willful wrongdoing, repeated carelessness or negligence that equals willful misconduct and culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000).

Iowa Code § 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.

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(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.

In the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), the Supreme Court of Iowa held that excessive, unexcused absenteeism is a form of job misconduct. The Court held that absences must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The Court further held, however, that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer. The Court in the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of "personal responsibility" such as transportation problems or oversleeping are considered unexcused.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires the consideration of past acts and warnings. The evidence, however, must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8).

The evidence in the record establishes that although Ms. Goerdts may have accumulated nine infraction points due to a transportation problem in July that caused her to miss work, the most recent absence that prompted the decision to discharge Ms. Goerdts was because she was ill and unable to work and had properly reported her impending absence to company management. A reported absence related to illness or injury is excused for the purposes of the Iowa Employment Security Act. The employer's no fault absenteeism policy is not dispositive of the issue of qualification for benefits.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge thus concludes that Ms. Goerdts was discharged for no disqualifying reason. Accordingly, the claimant is eligible to receive unemployment insurance benefits, providing that she meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated October 17, 2016, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs