

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

KIMBERELY A DURHAM  
2036 – 9<sup>TH</sup> ST APT 38  
CORALVILLE IA 52241-1512

WAL-MART STORES INC  
C/O FRICK UC EXPRESS  
PO BOX 383  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-05304-JTT  
OC: 04/23/06 R: 03  
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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the April 23, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 7, 2006. Claimant Kimberely Durham participated. Assistant Manager Joe Eldred represented Wal-Mart. Exhibits One through Four and Six were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kimberely Durham was employed by Wal-Mart as a full-time cashier from September 10, 2002 until April 26, 2006, when Assistant Manager Joe Eldred discharged her. The final incident that prompted the discharge occurred on April 26, when Ms. Durham returned to work after receiving a “decision making day” on April 25 and failed to produce a written plan for how she

was going to address what the employer deemed a pattern of excessive absences. Ms. Durham reads at a fourth grade level and has commensurate reading comprehension skills. Pursuant to being placed on a decision making day, Ms. Durham had pondered her attendance history as directed by the employer, but believed the employer was counting against her absences that had, in fact, been excused by the employer at the time they occurred. When Ms. Durham attempted to raise this issue with Mr. Eldred upon her return to work on April 26, Mr. Eldred responded that he intended to proceed to the level of discipline and discharge. Mr. Eldred premised the discharge on what he deemed a refusal to follow instructions.

The absences that prompted the decision-making day had occurred in April. On April 15, Ms. Durham was absent due to illness and properly reported the absence to the employer. Ms. Durham appeared for her next shift on April 17, but left work early with permission after vomiting. Ms. Durham appeared and worked her full shift on April 18. On April 22, Ms. Durham worked half her scheduled shift before she vomited and was otherwise ill and went home early with approval. On April 23-24, Ms. Durham was absent due to illness and properly reported the absences to the employer. When Ms. Durham appeared for her shift on April 25, Mr. Eldred summoned her to the office and issued the decision-making day.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Durham was discharged for misconduct in connection with the employment. 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.

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).

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. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a 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 Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Ms. Durham's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The weight of the evidence in the record indicates that Ms. Durham had good cause for not presenting a written document to the employer in response to the decision-making day. The evidence indicates that Ms. Durham had complied with the employer's directive to ponder her attendance, returned to work on April 26 prepared to discuss the matter with the employer, and raised legitimate concerns about the disciplinary action. The evidence does not support a finding of substantial misconduct. The employer asserted it was not the absences, in and of themselves, that prompted the discharge, but the failure to appropriately respond to the decision making day. The administrative law judge has concluded that Ms. Durham's response was appropriate in light of her abilities. The administrative law judge notes that the absences

that prompted the discharge were for illness properly reported to the employer and would be deemed excused absences under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Durham was discharged for no disqualifying reason. Accordingly, Ms. Durham is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Durham.

**DECISION:**

The Agency representative's decision dated April 23, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kkf