

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY M MARSHALL
Claimant

APPEAL NO: 17A-UI-06670-TNT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC.
Employer

OC: 06/04/17
Claimant: Appellant (2)

Iowa Code § 96.5(2) A – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated June 22, 2017, reference 01, was denied unemployment insurance benefits finding that the claimant was discharged from work on June 4, 2017 for excessive unexcused absenteeism and tardiness after being warned. After due notice was provided, a telephone conference hearing was held on July 19, 2017. Claimant participated. The employer participated by Mr. William Hackbarth, Assistant Manager. Claimant's Exhibit 1 was admitted into the hearing record.

ISSUE:

Whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: Wendy Marshall was employed by Wal-Mart Stores, Inc. from February 3, 2015 until June 4, 2017 when she was discharged for violating the company's attendance point policy. Ms. Marshall was employed as a part-time cashier working approximately 30 hours per work and was paid by the hour. Her immediate supervisor was Mr. Hackbarth, Assistant Manager.

Ms. Marshall was discharged on June 4, 2017 because her absence on May 23, 2017 had caused her to exceed the permissible number of infraction points allowed under the company's attendance policy that had been implemented on March 3, 2016.

Under the terms of the company policy, the employees are subject to discharge if they accumulate nine infraction points during a six month rolling period. The employees are assessed one point for each day's absence that is properly called in and assessed one half a point for each tardiness or leaving early more than ten minutes duration. Failure to report or notify the employer results in three attendance infraction points. The oldest attendance infraction point rolls off after six months.

The final incident that caused Ms. Marshall's discharge took place on May 23, 2017. On that date, Ms. Marshall was ill and unable to report for work due to kidney stones. The claimant was ill and vomiting, but properly notified the employer of her impending absence on that day. Ms. Marshall suffers from a chronic kidney stone condition and she has repeatedly been seen and treated for her malady by medical practitioners. Eight of the nine attendance infraction points assessed against the claimant's attendance record were caused by her medical condition. Claimant properly notified the employer of each absence as required by company policy.

Although Ms. Marshall has requested and has been approved for intermittent medical leave in the past, she did not most recently apply for a medical leave of absence because she was not aware that her employment was in jeopardy due to accumulation of attendance infraction points and because she did not anticipate her most recent absence from work.

The claimant had received no warnings from the employer prior to being discharged. The company instead uses a system where employee's self-check their attendance infraction points to make themselves aware of their attendance status with the company.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct on the part of the claimant 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, 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(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 discharge cases, the employer has the burden of proving disqualifying conduct on the part of the claimant. 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).

The propriety of the discharge is not the issue in this unemployment insurance appeal. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation.

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.IA C24.32 (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 IA C24.32 (8). Absences related to personal responsibility such as transportation or over-sleeping are considered unexcused. Absences related to illness are considered excused, providing the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness or leaving early are forms of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

In the case at hand, Ms. Marshall did follow the employer's attendance policy by calling the employer to inform them of her impending absence on April 23, 2017, due to illness.

The Supreme Court of the State 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 misconduct. The court held that the absences must both be excessive and unexcused and that the concept includes tardiness, leaving early etc. The court further held however, that absences due to illness are deemed excused if the employee properly notifies the employer.

The record in this matter establishes that the majority of the claimant's absences were due to illness and therefore "excused" for the purposes of the unemployment insurance law. The evidence also establishes that Ms. Marshall properly notified the employer of her impending absences as required by company policy.

The issue in that matter is not whether the employer had a right to discharge Ms. Marshall for these reasons, but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Ms. Marshall may have been a sound decision from a management viewpoint, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated June 22, 2017, (reference 01, is reversed. Claimant was discharged under non-disqualifying conditions, unemployment insurance benefits are allowed provided claimant is otherwise eligible and meets requirements of Iowa law.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn