

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA J NELSON

Claimant

APPEAL NO. 11A-UI-08210-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 05/08/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated June 15, 2011, reference 02, which denied unemployment insurance benefits. After due notice was issued, a telephone hearing was held on July 18, 2011. The claimant participated personally. Participating as a witness for the claimant was Ms. Melody Collins, former employee. The employer participated by Ms. Amy Denniston, assistant manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Lisa Nelson was employed by Wal-Mart Stores from December 14, 2006, until May 12, 2011, when she was discharged from employment. Ms. Nelson last held the position of part-time sales associate and was paid by the hour. Her immediate supervisor was Jan King.

Ms. Nelson was discharged when the employer believed that she had exceeded the permissible number of attendance infractions allowed under the company's no-fault attendance points system. Under the system, employees are subject to discharge if they accumulate six or more attendance points in a rolling six-month period. Ms. Nelson was aware of the policy and had been warned. Ms. Nelson was last absent from work on May 8, 2011. On that date, the claimant properly called in to report her impending absence due to illness.

Prior to being discharged, Ms. Nelson disputed the number of attendance infraction points that were being assessed to her and requested to go up the chain of command because she believed she had not accumulated sufficient infraction points to be given a one-day "decision day" suspension. Upon disputing her last absence and the imposition of disciplinary action, the claimant was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct 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:

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.

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 that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the 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 App. 1992).

The Supreme Court 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 included tardiness, leaving early, etc. The Court in the Higgins case further stated, however, that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer.

In the case at hand, the evidence in the record establishes that Ms. Nelson was ill on her final absence and that she properly notified the employer of her impending absence. The administrative law judge concludes that the claimant's disputing with the employer the number of infractions assessed against her and the claimant's request to go up the chain of command did not rise to the level of disqualifying misconduct. The claimant was reasonable in her belief that attendance points were not being properly assessed and the claimant reasonably believed that she was properly exercising her right to go up the chain of command when she believed that a disciplinary action was being imposed unjustifiably. Benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated June 15, 2011, reference 02, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw