

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DEBRA M WILSON
Claimant

APPEAL NO. 19A-UI-00713-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 12/30/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Walmart (employer) appealed a representative's January 15, 2019, decision (reference 01) that concluded Debra Wilson (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 8, 2019. The claimant participated personally. The employer participated by Troy McKenna, Assistant Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 8, 2015, as a full-time service desk associate. She signed the employer's checklist on September 8, 2015, and the employer's attendance policy on February 27, 2016. The attendance policy stated, "If you accumulate nine (9) or more occurrences in a rolling six-month period, through any combination, you will be subject to termination".

The employer issued the claimant a written warning on May 24, 2017, for respect issues. That warning expired on May 24, 2018. On March 12, 2018, the employer issued the claimant a second written warning for cash shortages. The employer notified the claimant that further infractions could result in termination from employment.

The claimant properly reported all her absences. She was absent on July 13, 2018, to attend her deceased husband's memorial service. Her friend attempted suicide, was placed on life support, and later passed away. The claimant was absent from work to visit her in the hospital on December 6 and 12, 2018. The employer mistakenly scheduled the claimant to work on her day off, November 27, 2018. The claimant followed her supervisor's instructions by reporting

her absence. The supervisor said the occurrence would be removed from the claimant's record. It was not.

On August 2, September 15, October 14, November 11, and December 28, 2018, the claimant was absent due to illness. She properly reported each absence. On December 29, 2018, the employer terminated the claimant for accumulating nine occurrences in six months.

The claimant filed for unemployment insurance benefits with an effective date of December 30, 2018. The employer planned to participate at the fact finding interview on January 14, 2019, by Troy McKenna. Mr. McKenna placed the fact finder on hold while he collected documents and/or went to another telephone. After five minutes the fact finder disconnected. Mr. McKenna did not attempt to connect with the fact finder. The employer provided some documents for the fact finding interview. It did not include the circumstances of all incidents the employer contended met the definition of unexcused absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. 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). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on December 28, 2018. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The administrative law judge finds the claimant's testimony to be more credible. The employer's testimony was internally inconsistent.

DECISION:

The representative's January 15, 2019, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs