

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TABITHA M SMITH
Claimant

APPEAL NO. 10A-UI-12380-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 07/25/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 23, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 15, 2010. Claimant participated. Dennis Sabel represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tabitha Smith was employed by Wal-Mart as a full-time stocker from April 2009 until July 26, 2010, when Dennis Sabel, Assistant Manager, discharged her for attendance. Ms. Smith's work hours were 10:00 p.m. to 7:00 a.m.. Friday through Tuesday.

If the Ms. Smith needed to be absent from work the employer's written attendance policy required that she notify the employer by calling the designated number prior to the scheduled start of her shift. Ms. Smith was aware of the policy and always followed this procedure when she needed to be absent.

The final absences that prompted the discharge occurred on July 24, 2010. On July 23, Ms. Smith received a telephone call at work from hospital personnel who advised her that her grandmother had suffered a heart attack. Ms. Smith's grandmother was Ms. Smith's childcare provider. Ms. Smith has two children, ages one and five-years-old. Ms. Smith is a single parent. On July 23, Ms. Smith left work early with permission to be with her grandmother. Ms. Smith's children were at that point in the care of Ms. Smith's 21-year-old brother, a person Ms. Smith deemed unreliable to provide regular childcare for her children. On the morning of July 24, Ms. Smith notified the employer in a timely manner that she needed to be absent due to the lack of a babysitter. When Ms. Smith contacted the employer, she asked to commence a leave of absence so that she could locate a new babysitter. The employer denied the request for leave. Ms. Smith had her father watch her children so that she could report for work on the

evening of July 25, 2010. On the morning of July 26, at the end of the overnight shift, the employer discharged Ms. Smith from the employment.

The employer considered prior absences in making the decision to discharge Ms. Smith from the employment. Ms. Smith had been absent on February 11, 12, and 18, with proper notice, for reason neither she nor the employer can recall. On March 24, 2010, Ms. Smith fell and suffered an injury to her head and shoulders. On March 24, 25, 26 and 27, 2010, Ms. Smith was absent due to her injury and properly reported the absences. On April 23 and May 18, 2010, Ms. Smith was absent with proper notice for reasons neither she nor the employer can recall. On June 6, 2010, Ms. Smith left work early with permission so that she could take her son to the hospital to address a high fever. On June 21 and 22, Ms. Smith was absent due to illness properly reported. On July 19, Ms. Smith was absent with proper notice for reasons neither she nor the employer can recall.

REASONING AND CONCLUSIONS OF LAW:

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 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 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 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 employer has presented sufficient evidence only to establish a single unexcused absence on July 24, 2010, when Ms. Smith was absent due to the lack of a babysitter. The weight of the evidence indicates that Ms. Smith’s early departure on July 23 was due to a family medical emergency and that Ms. Smith obtained proper approval from the employer before she left work early. The balance of the absences were either for illness properly reported or were absences properly reported without the employer supplying additional evidence to establish an unexcused absence.

A single unexcused absence is not misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989)

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

DECISION:

The Agency representative's August 23, 2010, reference 01, decision is reversed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css