

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANINE M WEEKS

Claimant

APPEAL NO. 07A-UI-08371-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

**OC: 07/22/07 R: 03
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 23, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on September 17, 2007. Claimant participated and was represented by Phil Miller, Attorney at Law. Employer participated through Angela Neff. Claimant's Exhibits A through D were received. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time associate from October 1, 2002 until July 18, 2007 when she was terminated due to three no-call/no-show absences and considered it job abandonment according to company policy. Claimant presented the completed paperwork for FMLA to Tom, General Manager, on June 28, 2007. On July 16, Tom called claimant into his office and told her the leave request was denied but did not give a reason. Claimant believed her job was terminated but did not ask if she was fired and did not call or report for scheduled work on July 18, 19 or 21 because she thought employer would call her about the FMLA paperwork. After employer did not contact her, she called her immediate supervisor Emily on July 22 to ask about the status of her employment. Emily said she would call back with the information but did not.

Employer knew claimant was not at work from July 18 on due to her history of chronic severe depression. Employer had issued counseling notices about attendance and the importance of calling in and that three no-call/no-show absences results in job abandonment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Since employer did not give a reason for the denial of leave, admittedly knew the reason why claimant was absent, and generally created a confusing situation due to lack of clear communication, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The August 23, 2007, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css