

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

CORNELIA L WALTON
545½ – 20TH AVE
MOLINE IL 61265-4656

PER MAR SECURITY & RESEARCH CORP
PER MAR SECURITY SERVICES
C/O TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 06A-UI-01585-JTT
OC: 01/08/06 R: 12
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Per Mar Security Services filed a timely appeal from the January 30, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 27, 2006. Claimant Cornelia Walton participated. Human Resources Representative Gretchen Goettig represented the employer and presented additional testimony through Operations Manager Steven Szalo. Exhibits One, Three, Four, and Five were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cornelia Walton was employed by Per Mar Security Services as a full-time security officer from

December 5, 2003, until December 30, 2005, when Operations Manager Steven Szalo discharged her for excessive absences. The employer's attendance policy required Ms. Walton to notify the employer at least four hours prior to the scheduled start of a shift if she needed to be absent from the shift. Ms. Walton was aware of the employer's policy.

The final absence that prompted the discharge occurred on December 28, 2005. Ms. Walton notified the employer one hour prior to the scheduled start of her shift that her husband had just assaulted her, that she had called the police, that she was distraught, and that she would not be able to appear for her shift. The incident had taken place at Ms. Walton's home and her husband had left the home prior to the arrival of the police. Ms. Walton did not press charges against her husband.

In making the decision to discharge Ms. Baldwin, Mr. Szalo considered absences going back to June 2, 2005, the date of the most recent warning the employer had issued to Ms. Walton regarding attendance. On February 4, 2005, Ms. Walton had received a prior warning for absences. On June 2, 2005, Ms. Walton had left early due to illness. Ms. Walton has suffered ongoing pain related to a bulging disk in her spine. Ms. Walton had made Operations Manager Steven Szalo aware of her back problems. On September 9, 2005, Ms. Walton intended to go to work, but was suffering severe pain that prompted her to go the hospital for treatment. While Ms. Walton was at the hospital, she was prescribed pain medications. Ms. Walton still intended to report for work, but the hospital staff did not believe it was appropriate for her to go to work under the influence of the pain medications. A nurse contacted the employer less than four hours prior to the scheduled start of the shift to notify the employer that Ms. Walton would not be able to report for work. On September 24, 2005, Ms. Walton was absent for illness properly reported to the employer.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Walton was discharged for misconduct in connection with her employment based on excessive *unexcused* absences. 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(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.

The employer bears 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).

In order for Ms. Walton's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that Ms. Walton'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 reasonable 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 evidence indicates that Ms. Walton was the victim of an assault that occurred approximately one hour prior to the start of her shift on December 28, 2005. The evidence fails to indicate that Ms. Walton had any control over the timing of the assault. The circumstances justified Ms. Walton's failure to notify the employer at least four hours prior to scheduled start of her shift. Despite having just been assaulted, Ms. Walton did notify the employer one hour prior to the scheduled start of her shift, and this constituted reasonable notice under the circumstances. The administrative law judge concludes that Ms. Walton's absence on December 28, 2005, was an excused absence under Iowa law. The evidence in the record fails to provide a "current act" of misconduct on the part of Ms. Walton that could serve as a basis for disqualifying her for unemployment insurance benefits. See 871 IAC 24.32(8). Having concluded there was no current act of misconduct, the administrative law judge need not address whether prior absences were unexcused or excessive. See 871 IAC 24.32(7). Nonetheless, the evidence in the record establishes that Ms. Walton's prior absences would all be deemed excused under Iowa law. Ms. Walton is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The representative's decision dated January 30, 2006, reference 02, is affirmed. The claimant was discharged from her employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

jt/kjw