

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFF S GROSHONG
Claimant

APPEAL NO. 16A-UI-09737-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/14/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jeff Groshong (claimant) appealed a representative's August 31, 2016, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Wal-Mart Stores (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 23, 2016. The claimant participated personally. The employer participated by Lisa Ashmore.

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 November 15, 2010 as a full-time overnight produce stocker. He always had Wednesdays and Thursdays off. In six years his schedule had not changed. From time to time the scheduler had accidentally given the claimant the wrong days off. The employer always told the claimant to stick to his normal schedule and take Wednesday and Thursday off, no matter what the scheduler put down for him.

The employer changed the attendance policy in March 2016. It verbally discussed the policy with the claimant and he signed for receipt of the internet policy on March 5, 2016. The policy stated employees could be terminated if they accumulated nine attendance points in a rolling six month period.

The claimant was absent due to a medical reason six times after the new policy came into effect. He properly reported each absence and accumulated 5.5 attendance points. He properly reported his absence due to two personal reasons and received two attendance points. One of the absences was when the employer terminated the claimant's wife. The employer did not issue the claimant any warnings.

The claimant looked at his schedule on July 12, 2016, and did not see anything out of the ordinary through July 30, 2016. The claimant took vacation on July 31 and August 1, 2016, when his daughter got married. He returned to work on August 2, 2016. On August 2, 2016, the new schedule was posted but the claimant did not look at it. If he had looked at it he would have noticed that the scheduler did not give him his normal days off. The scheduler had the claimant working eight days without a day off. The claimant did not appear for work on Wednesday, August 3, and Thursday, August 4, 2016. He returned to work on August 5, 2016. The employer terminated the claimant on August 5, 2016, because the claimant did not appear for work or notify the claimant of his absence on August 3 and 4, 2016.

REASONING AND CONCLUSIONS OF LAW:

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

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.

Iowa Admin. Code r. 871-24.32(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

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.

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).

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). Most of the claimant's absences were due to medical issues and properly recorded. Those absences do not constitute misconduct.

The final absences were for days of the week the claimant does not work. He has not worked those days in six years. He was specifically told by the employer not to work those days, even if they appeared on his schedule. The claimant followed the employer's instructions and worked the days the employer directed. The employer terminated the claimant for following its directives. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's August 31, 2016, decision (reference 01) is reversed. 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/pjs