

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS W CLARK
Claimant

APPEAL NO. 08A-UI-05602-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 05/18/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Thomas Clark filed an appeal from a representative's decision dated June 10, 2008, reference 01, which denied based upon his separation from Wal-Mart Stores. After due notice was issued, a hearing was held by telephone on July 1, 2008. Mr. Clark participated personally. The employer participated by Diane Barton, human resource manager.

ISSUE:

At issue in this matter is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: The claimant was employed by Wal-Mart Stores from April 26, 2004, until May 17, 2008, when he was discharged for exceeding the permissible number of attendance infractions allowed under company policy. Mr. Clark was employed as a full-time shipping loader and was paid by the hour.

The claimant was discharged based upon his absence from work in violation of company policy. Mr. Clark had received a verbal warning and two written warnings from the company prior to being discharged. Mr. Clark was not able to report for scheduled work due to a back injury and had provided notification to the employer of his impending absences and the reasons for them.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Clark was discharged for intentional misconduct in connection with the employment. It does not.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. The claimant was discharged when he exceeded the permissible number of attendance infractions allowed under company policy. The evidence establishes that Mr. Clark was unable to report to

work due to a back injury or condition and had provided proper notification to the employer regarding his impending absences.

The Iowa Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is one form of misconduct. The Court held that the absenteeism must be both excessive and unexcused. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. The evidence in the record establishes that the claimant was absent due to injury or illness and had notified Wal-Mart Stores. The focus in determining whether the conduct of an employee is misconduct in connection with the work is on deliberate, intentional, and culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct of Appeals 1992).

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.

For the reasons stated herein, the administrative law judge concludes that the claimant's discharge took place under non-disqualifying conditions. Benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated June 10, 2008, reference 01, is hereby reversed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw