

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENYA C BARBER
Claimant

APPEAL NO. 06A-UI-09749-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 09/10/06 R: 01
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Kenya Barber filed a timely appeal from the October 5, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 18, 2006. Ms. Barber participated. Assistant Manager Gregory Smith represented the employer and presented additional testimony through Assistant Manager Amanda Hansen. Employer's Exhibits One through Five were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kenya Barber was employed by Wal-Mart on a full-time basis from August 28, 2006 until September 13, 2006, when Assistant Manager Amanda Hansen discharged her for attendance. At the time Ms. Barber separated from the employment, she worked in the employer's deli.

The final absence that prompted the discharge occurred on September 8, 2006, when Ms. Barber was absent because she needed to take her child for medical evaluation after Ms. Barber and the child had been in an auto accident the previous evening. On September 8, Ms. Barber was scheduled to work at 8:00 a.m. Ms. Barber did not notify the employer of the absence until 8:40 a.m. At that time, Assistant Manager Gregory Smith spoke with Ms. Barber and logged the call when it occurred.

The employer has a written attendance policy. Under the policy, employees are required to telephone at least two hours prior to the scheduled start of the shift and speak with a member of management. Ms. Barber was aware of the policy. Ms. Barber had no other attendance issues in September. Ms. Barber had been tardy on August 9. On August 13, Ms. Barber was absent due to illness and had notified the employer at 7:20 a.m. that she would be absent for her

8:00 a.m. shift. Ms. Barber had earlier absences due to illness, but the employer is not able to say whether she failed to comply with the call-in policy.

At the time of the discharge, the employer was also concerned with Ms. Barber's work performance. However, the concern over the work performance was not the basis for the discharge. The work performance concern centered on Ms. Barber and/or a coworker failing to consistently monitor and record food item temperatures. The employer is not able to say with certainty the extent to which the failure to monitor and record temperatures was attributable to Ms. Barber versus her coworker.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Barber was discharged for misconduct in connection with the employment. 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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 Ms. Barber’s absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 evidence in the record establishes that Ms. Barber’s final absence on September 12, 2006 was unexcused. Although the absence was due to illness, the greater weight of the evidence indicates Ms. Barber notified the employer after the scheduled start of the shift, in violation of the employer’s policy. The evidence indicates that Ms. Barber’s most recent prior unexcused absence had occurred one month earlier, when Ms. Barber was absent due to illness, but failed to properly notify the employer. The only other unexcused absence supported by the evidence is the tardiness on August 9. The administrative law judge concludes that the unexcused absences supported by the evidence were not excessive. The administrative law judge further concludes that the food temperature concern raised by the employer during the hearing was not in fact a basis for the discharge. This conclusion is supported by the exit interview documentation and prior written warnings the employer submitted for the hearing and the lack of such documentation pertaining to the food temperature issues.

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

DECISION:

The Agency representative's October 5, 2006, 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

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