

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEITH A CARR
Claimant

APPEAL NO. 16A-UI-01291-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 01/03/16
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from a representative's decision dated January 26, 2016 (reference 01) which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on February 24, 2016. The claimant participated. The employer participated by Ms. Angel Boring, Store Manager, and Mr. Brad Baker, Assistant Manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Keith Carr was employed by Wal-Mart Stores, Inc. from November 5, 2014 until December 31, 2015; when he was discharged from employment. Mr. Carr was employed as a part-time sales associate, working approximately 20 hours per week, and was paid by the hour. His immediate supervisor was Mr. Baker.

Mr. Carr was discharged from Wal-Mart Stores, Inc. on December 31, 2015; after he exceeded the permissible number of attendance infractions allowed under company policy. Under the policy, an employee is given one occurrence for each day of absence. Three incidences of tardiness are considered to be one occurrence of absence. If an employee is absent for up to three consecutive work days for the same reason, the absences are counted as one occurrence. If an employee accumulates three occurrences in a row in a six-month period, they receive a warning in the form of a personal discussion. If the employee has more than three occurrences in a row in six-months period, the worker is given additional disciplinary actions for each occurrence. An employee is subject to discharge if they accumulate seven unauthorized absences within a six-month rolling period.

Prior to being discharged, Mr. Carr had been warned about attendance and had also received a warning for failure to report or provide required notification on one occasion. The final events that caused the claimant's discharge from employment took place on December 23, 24, and 28, 2015.

On December 23, Mr. Carr called off work and cited an approaching winter storm as the reason for not reporting that day. Mr. Carr called off work on December 24, 2015 because of weather conditions; it had snowed approximately seven inches that day and continued to snow, and the claimant believed that he could not safely drive the 30 miles from his home to work. Mr. Carr returned to work and work his scheduled shift on December 26, 2015. The claimant called off work on December 28, 2015; due to blizzard conditions and impassable roads. Mr. Carr reported for scheduled work on December 31, 2015 and completed his work shift before being discharged at the end of the shift for exceeding the number of attendance infractions allowed under Wal-Mart policy.

Prior to the final incidence that had caused Mr. Carr's discharge from employment, the claimant had been absent to work due to illness on September 21 and 22, 2015. He received one point for failure to work a full work shift on August 18, 2015. The claimant had called off work on July 16, 2015 and had failed to report or provide notification to the employer for a July 4, 2015 absence.

It is the employer's position that a number of other employees were able to arrive at work during winter conditions on December 23, 24, and 28, 2015; and that the claimant had no good cause reason for failing to report those days.

REASONING AND CONCLUSIONS OF LAW:

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. 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, may not necessarily be 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. of Appeals 1992).

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 and (7) 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).

(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.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant'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. The evidence must first establish, however, that the most recent absences that prompted the decision to discharge the employee were unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as car problems or oversleeping are considered unexcused. Absences related to illness or other compelling factors beyond the employee's control are considered excused, providing the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is also 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 the majority of the claimant's attendance infractions within the most recent six-month rolling period, were due to illness and were properly reported. The claimant on one occasion was intentionally absent for personal reasons and although he notified the employer in advance, he did not call in on the day itself and, therefore, that absence was not properly reported. The most recent absences that prompted the decision to discharge Mr. Carr took place due to inclement weather and the claimant's reasonable belief that there was a significant safety issue in traveling to work on December 23, 24, and 28, 2015. Mr. Carr properly reported to the employer his impending absences and the reasons for the absences on those dates.

The question before the administrative law judge in this case is not whether the employer had a right to discharge Mr. Carr for these reasons but whether the discharge was disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Mr. Carr may have been a sound decision from a management viewpoint, for the above stated reasons the administrative law judge concludes that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Accordingly the claimant was discharged from employment under non-disqualifying conditions and is eligible to receive unemployment insurance benefits, providing he meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated January 26, 2016 (reference 01) is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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