

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN L HARRELL
Claimant

APPEAL NO. 08A-UI-04963-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART
Employer

OC: 04/20/08 R: 02
Claimant: Respondent (1-R)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores filed a timely appeal from the May 14, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 9, 2008. Claimant Justin Harrell did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Assistant Manager Rebecca Breitbach represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Justin Harrell was employed by Wal-Mart as a full-time receiving associate from July 20, 2007 until April 24, 2008, when Assistant Manager Rebecca Breitbach decided to discharge him from the employment for attendance. Assistant Manager Mike Kiefling executed the discharge. Mr. Harrell's regular work hours were 10:00 p.m. to 7:00 a.m. up until March 20, 2008, when his hours changed to 10:00 p.m. to 2:00 a.m. Mr. Harrell had recently separated from his wife and was the primary caregiver for an eight-month-old baby and a three-year-old toddler. Mr. Harrell was able to arrange to have his mother care for the children until 2:00 a.m., at which time his mother had to leave for work. Mr. Harrell requested and received the earlier quitting time so that he could care for his children.

Mr. Harrell had last appeared and performed work for Wal-Mart on March 30, 2008. On March 31, Mr. Harrell contacted a doctor for a stomach ailment. The doctor diagnosed one or more ulcers and prescribed medication. On April 6, Mr. Harrell returned to the doctor, who prescribed a different medication to treat his stomach ailment. The doctor told Mr. Harrell that if his condition did not improve, he would need to be hospitalized. On April 12 Mr. Harrell injured his knee in a non-work-related incident. Mr. Harrell initially sought treatment at a hospital emergency room. Mr. Harrell followed up with his doctor on April 14 and on April 20.

Mr. Harrell has taken two prior leaves from the Wal-Mart employment and was familiar with the leave policy and application process. Mr. Harrell knew that his extended leave from Wal-Mart required that he submit a request for a leave of absence. In connection with the prior leaves, Mr. Harrell's mother had collected the leave applications from the employer. Mr. Harrell was not aware that his request for leave had to be submitted within 15 days of the beginning of his absence.

While Mr. Harrell was absent from the employment after March 30, 2008, Mr. Harrell continued to properly report his absences to the employer by calling a designated toll free number at least one hour prior to the scheduled start of his shift. When Mr. Harrell contacted the toll free number, the system would prompt him to enter the reason for the absence. The system would then forward Mr. Harrell to the Wal-Mart phone system so that Mr. Harrell could speak directly with a manager.

Mr. Harrell returned to the Wal-Mart on April 23 for the purpose of speaking with the personnel manager, Holly Dudley about his return to work. Ms. Dudley was not at the store, so Mr. Harrell indicated that he would return the next day to speak with Ms. Dudley. When Mr. Harrell returned to speak with Ms. Dudley on April 24, Ms. Dudley initially told Mr. Harrell that he was in good standing with the employer and that she would provide him with an application for leave so that his absences since March 30 would be covered by the leave policy. Mr. Harrell was then summoned to a meeting with Assistant Manager Keith Kiefling. Mr. Kiefling told Mr. Harrell that he was in violation of the employer's attendance points system and was discharged from the employment. Assistant Manager Rebecca Breitbach had that morning prepared termination documents concerning Mr. Harrell.

Ms. Dudley, Mr. Kiefling, and all the other managers with whom Mr. Harrell had contact concerning his absences after March 30 are still employed by Wal-Mart, but did not testify at the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

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). The administrative law judge notes that the employer did not present testimony from Ms. Dudley, Mr. Kiefling, and/or any of the other managers with whom Mr. Harrell had contact concerning his absences after March 30.

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. 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 employer had failed to produce sufficient evidence to establish, by a preponderance of the evidence, that Mr. Harrell's absences were for anything other than illness properly reported to the employer. Ms. Breitbach concedes that Mr. Harrell routinely contacted the employer's toll free number to report his absences after March 30. Ms. Breitbach asserts there were at least a couple dates when she was working and that Mr. Harrell did not call in on those dates. However, Ms. Breitbach is unable to say which days those were. The weight of the evidence indicates that Mr. Harrell's absences after March 30 were for illness and were properly reported to the employer.

The evidence does raise the question of whether, and to what extent, Mr. Harrell has been able to work and available for work since he established his claim for benefits. This matter will be

remanded to a Claims representative so that these issues may be investigated by a Claims representative.

DECISION:

The Agency representative's May 14, 2008, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

The matter is remanded to a Claims representative for determination of whether the claimant has been able to work and available for work since he established his claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs