

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER A REED
Claimant

APPEAL NO. 16A-UI-10623-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 09/04/16
Claimant: Respondent (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from a representative's decision dated September 20, 2016, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 12, 2016. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Ms. Nancy Oldfield, Assistant Store Manager. Employer's Exhibits A and B were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Christopher Reed was employed by Wal-Mart Stores, Inc. from October 13, 2015 until June 17, 2016 when he was discharged for excessive, unexcused absenteeism and tardiness. Mr. Reed was employed as a full-time truck unloader and was paid by the hour. His immediate supervisor was Lee Fogo.

Mr. Reed was discharged on June 17, 2016 after he exceeded the permissible number of attendance infractions allowed under the company's attendance policy and had been implemented by the company. Mr. Reed was aware of the policy and had acknowledged the receipt of it. Under the policy employees are assessed one infraction point for each day's absence that has not been previously excused and is assessed one-half infraction point for late arrivals or leaving early. If an employee misses a substantial portion of their entire workshift, they are assessed one infraction point. Failure to notify the employer of an impending absence results in four occurrence points being assessed against a worker. Employees are subject to discharge if they accumulate nine or more infraction points in a rolling six-month period and the oldest infraction rolls off after six months. Mr. Reed had been warned in December 2015 and on February 29, 2016. Although he had been warned and was aware of the policy, Mr. Reed between March 12, 2016 and June 7, 2016 arrived at work late or left work early on six

occasions, was absent from work on four occasions and failed to report or provide any notification to the employer on one occasion. The final infractions that caused Mr. Reed's discharge took place on June 5, 2016 when he was absent and did not notify the employer and on June 7, 2016 when he again reported to work late.

REASONING AND CONCLUSIONS OF LAW:

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).

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.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges a claimant for reasons that constitute work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden of proof the claimant was discharged for

work-connected misconduct as defined by the Iowa Unemployment Insurance Law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

For unemployment insurance purposes, misconduct amounts to a deliberate act and material breach of duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional, substantial disregard of the employer's interests or of the employee's duties and obligations 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 the consideration of past acts and warnings. However, the evidence must first establish that the most recent attendance infraction 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 or oversleeping are considered unexcused. Absences related to illness are considered excused providing the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness or leaving early are 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 Mr. Reed did not follow the employer's attendance policy in connection with his absences on June 5 and June 7, 2016. On June 5, the claimant was absent and failed to provide notification to the employer of his impending absence. Company policy required that the claimant personally notify the company that he would be absent and on June 7, 2016, Mr. Reed reported to work late. Because the claimant had numerous other attendance infractions and had been warned, a decision was made by the company to discharge Mr. Reed from his employment.

There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant's discharge took place under disqualifying conditions. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law.

Because the claimant has been deemed ineligible for benefits, any benefits claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment benefits in the amount of \$675.00 since filing a claim with an effective date of September 4, 2016 for the week ending dates of September 10, 2016 through October 8, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The representative's decision dated September 20, 2016, reference 01, is reversed. Claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$675.00 and is liable to repay that amount. The employer's account shall not be charged since employer did participate in the fact finding.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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