

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**NATHAN S PEARCE
19 – 26TH ST SW
MASON CITY IA 50401**

**WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 06A-UI-01307-JTT
OC: 01/01/06 R: 02
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the January 23, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 20, 2006. Claimant participated. Assistant Manager Derrick Orr represented Wal-Mart. Exhibits One through Three, and Five were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathan Pearce was employed by Wal-Mart as a full-time overnight assembler from May 16, 2005, until November 8, 2005, when Assistant Manager Derrick Orr terminated the employment after concluding that Mr. Pearce had abandoned the employment. Mr. Pearce last appeared and worked a scheduled overnight shift on October 27-28. Mr. Pearce was subsequently

scheduled to work on October 31 and November 1-6. On October 31, Mr. Pearce's fiancée was ill and was unable to care for the couple's six-month-old child. Mr. Pearce properly notified Wal-Mart that he would be absent due to illness. On November 1, Mr. Pearce's fiancée was still ill. Mr. Pearce contacted an overnight manager at Wal-Mart. Mr. Pearce properly notified the manager that his fiancée was ill and that he would therefore be absent from work. On November 2, Mr. Pearce learned from a fellow employee that the employer had recorded his absence of the previous evening as a "no-call, no-show." On November 2, Mr. Pearce telephoned Wal-Mart and spoke to an assistant overnight manager and properly notified the employer that he would be absent from work that evening. Soon after the call, Mr. Pearce went to Wal-Mart to speak with the assistant overnight manager. Mr. Pearce explained that his fiancée had been ill, and that this had been the basis for his absences. The assistant manager instructed Mr. Pearce to make contact with the employer's personnel office the next day regarding a request for a leave of absence.

On November 3, Mr. Pearce went to the personnel office and spoke to a representative, Nancy. Mr. Pearce shared with Nancy that he had spoken to the assistant overnight manager and that the assistant manager had advised him that he needed to complete a leave of absence form. Nancy talked to Mr. Pearce about the information the employer required for a leave of absence. Nancy told Mr. Pearce that the store manager would need to approve the leave of absence. Mr. Pearce completed the leave of absence form while he was at the personnel office. Mr. Pearce was confused by some of the questions on the form and asked Nancy for assistance. Mr. Pearce was unsure of what he should put down on the form regarding the length of the requested leave. Mr. Pearce thought he would be off work for 1 1/2 weeks. Though Mr. Pearce's fiancée had not consulted a doctor, Mr. Pearce and his fiancée had concluded that the fiancée had a urinary tract infection. Mr. Pearce and his fiancée did not have health insurance and could not afford to consult a doctor. Nancy told Mr. Pearce to put down that the leave will last a month, just in case.

After Mr. Pearce finished completing the leave of absence form, Nancy paged the store manager. An assistant manager answered the page and indicated that the manager was unavailable. The assistant manager then met with Mr. Pearce. The assistant manager indicated that she would explain the leave request to the store manager. Mr. Pearce observed the assistant manager put the leave request form on the manager's desk. The assistant manager told Mr. Pearce that he could assume the request leave was approved unless he heard back from the store manager. Mr. Pearce did not hear back from the store manager. The next week, Nancy contacted Mr. Pearce's fiancée and told her that Mr. Pearce's employment had been terminated, based on three consecutive "no-call, no-show" absences. After Mr. Pearce learned of the termination, he began work as an independent contractor selling Kirby vacuums.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether the evidence in the record establishes that Mr. Pearce voluntarily quit the employment by being absent three times without notifying the employer.

871 IAC 24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa

Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The weight of the evidence in the record indicates that Mr. Pearce had in fact properly notified the employer. Accordingly, the administrative law judge concludes that Mr. Pearce did not voluntarily quit the employment due to "no-call, no-show" absences.

The remaining question is whether the evidence in the record establishes that Mr. Pearce was discharged for misconduct. 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 to 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).

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 evidence in the record indicates that Mr. Pearce properly notified the employer with regard to the absences. The evidence further indicates that Mr. Pearce reasonably concluded that the store manager had approved a leave of absence for a period of one month. The evidence indicates that there was a lack of communication between management staff, both with regard to Mr. Pearce's notification of the employer regarding the absences and with regard to further action to be taken on the request for the leave of absence. The evidence in the record fails to establish any misconduct on the part of Mr. Pearce.

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

DECISION:

The Agency representative's decision dated January 23, 2006, reference 01, 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.

jt/kjw