

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILLIP B BARNETT
Claimant

APPEAL NO. 11A-UI-02523-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 01/23/11
Claimant: Appellant (1)**

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 22, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 28, 2011. Employer participated by Molly Lemaster, Assistant Manager. Claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Molly Lemaster.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was employed as an overnight maintenance worker at the employer's store in Mt. Pleasant, Iowa. The claimant was initially hired as a part-time employee and later became a full-time employee. His last day of work was January 24, 2011. He was terminated on January 24, 2011.

The incident that led to the claimant's termination occurred on January 24, 2011. The claimant was late for work. The claimant was on his final step of progressive discipline. He was placed on that final step on July 27, 2010. He knew his continued employment was in jeopardy. The claimant was tardy on January 18, 2011; January 10, 2011; December 7, 2010; November 29, 2010; October 25, 2010; and May 5, 2010. The claimant was on the final step of progressive discipline due to instance of no-call/no-show on May 3, 2010; May 25, 2010; June 2, 2010; July 10, 2010; and July 11, 2010.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) The employer has the burden of proof to establish misconduct.

The evidence in this case shows that the claimant was terminated for excessive tardiness. After he was placed on the final step of progressive discipline for attendance problems, he was then late on five occasions, not including the date of termination. The claimant was late on January 24, 2011. He was terminated that day due to excessive tardiness. The claimant did not testify at the hearing and the reasons for his late arrivals are not known. The claimant was discharged for misconduct. Benefits are denied.

DECISION:

The decision of the representative dated February 22, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css