

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADJO A PASSAH

Claimant

APPEAL NO. 11A-UI-03745-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 02/06/11

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 22, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 26, 2011. Claimant participated and presented additional testimony through Roseline Wah. Sean Stewart, Assistant Manager, represented the employer. Exhibits 1 through 12, A, B, and C were received 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: Adjo Passah was employed by Wal-Mart as a full-time maintenance associate from 2006 until February 7, 2011, when the employer discharged her for attendance and for failure to follow the employer's directive to produce a written plan for improving her attendance. The final absence that triggered the discharge occurred on February 7, 2011, when Ms. Passah was late for personal reasons and failed to present the required plan for improving her attendance. In response to Ms. Passah's no-call/no-show absences on January 29, 30, and 31, 2011, and after prior reprimands for attendance, the employer issued a further reprimand to Ms. Passah for attendance and imposed a paid "decision-making" day as the last step in the employer's progressive discipline procedure before Ms. Passah would be discharged from the employment. The employer provided Ms. Passah with clear instructions that she was to prepare a written plan to provide to the employer when she returned to work on February 5, 2010. Ms. Passah was absent due to illness properly reported on February 5, the day she was supposed to deliver the plan for improvement. Ms. Passah appeared for work on February 6, but did not bring the plan. When Ms. Passah was not only late on February 7, but appeared again without the plan for improvement, the employer discharged her from the employment.

In making the decision to discharge Ms. Passah from the employment, the employer considered prior reprimands for attendance and prior attendance matters. On August 9, 2010 the employer

issued a written reprimand based on Ms. Passah being late for personal reasons on June 28, June 29, and August 9. On September 12, 2010, the employer issued another reprimand based on Ms. Passah being late for work or leaving work early for personal reasons on July 13, August 9, and August 17. The administrative law judge notes that Ms. Passah apparently both arrived late and left early on August 9, 2010. Ms. Passah was absent due to illness properly reported on August 24 and October 15, 2010.

In connection with the no-call/no-show absences at end of January 2011, Ms. Passah had incorrectly read her work schedule on the posted work schedule.

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).

While past acts and warnings can be used to determine the magnitude of the current act of 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). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

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 evidence in the record establishes excessive unexcused absences that constitute misconduct in connection with the employment. The unexcused absences included the no-call/no-show absences on January 29, 30 and 31 and the tardiness on February 7, 2011. These absences alone were excessive. The weight of the evidence establishes that Ms. Passah was on the schedule to work, misread her schedule, and failed to take reasonable steps to ensure that she correctly understood her work schedule. But the occurred in the context of earlier reprimands for attendance and earlier issues with tardiness. The final absence occurred in the context of a reprimand for attendance that has just been issued five days earlier.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence establishes that Ms. Passah unreasonably failed to follow the employer's reasonable directive to create a plan of action, or to at least make some notes on the matter. Because Ms. Passah's failure to follow the employer's directive appears to be limited to the issue of the written plan for improvement, the evidence fails to establish a pattern of refusing the employer's reasonable directives.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Passah was discharged for misconduct. Accordingly, Ms. Passah

is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Passah.

DECISION:

The Agency representative's March 22, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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