

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

KYLA A JASTORFF  
2741 AVENUE G  
COUNCIL BLUFFS IA 51501

WAL-MART STORES INC  
c/o TALX UC EXPRESS  
P O BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-08192-JTT  
OC: 07/10/05 R: 01  
Claimant: Respondent (2)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences  
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the August 2, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 25, 2005. Kyla Jastorff participated and presented additional testimony through her mother, Nora Jastorff. Assistant Store Manager Chris Chambers represented Wal-Mart. Exhibits One through Four were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kyla Jastorff was employed by Wal-Mart as a full-time sales associate from June 30, 2004 until June 29, 2005, when Assistant Store Manager Chris Chambers discharged her for misconduct based on excessive absences. There was no other basis for the discharge.

The final absence occurred on June 28, 2005. On that date Ms. Jastorff left work early due to illness. Ms. Jastorff had fainted as she began to climb a ladder. Ms. Jastorff received permission before she left. Ms. Jastorff had been absent for her entire shift on June 27, 2005. Ms. Jastorff had been returning home from Fort Dodge when her car broke down. It was the June 27, 2005 absence that prompted the discharge. When another member of management passed along information to Mr. Chambers regarding the June 27 absence, Mr. Chambers made the decision to discharge Ms. Chambers.

Approximately three months prior to her discharge from the employment, Ms. Jastorff had contracted mononucleosis. Thereafter, Ms. Jastorff would partially recover from the illness and then succumbed again. Thus, Ms. Jastorff was able to return to work for brief periods of time, but would then be off again due to the illness. Ms. Jastorff had additional absences that were not attributable to the illness.

Wal-Mart has a written attendance policy that is reviewed with employees during orientation to the employment and is readily available for employees to review on the employer's computer network. The policy is also reviewed with an employee in connection with the issuance of reprimands for poor attendance. Under the policy, absences are tracked for a rolling six-month period. Under the policy, an employee who must be absent or late is expected to personally call his or her immediate supervisor, or another member of management, no later than one hour prior to the scheduled start time. Employees must notify the employer each day they are absent. Ms. Jastorff was familiar with the policy.

Wal-Mart has a system of recording absences that makes it difficult to distinguish absences that would be considered excused under the law from absences that would be considered unexcused under the law. Wal-Mart's record of Ms. Jastorff's absences is set forth Exhibit 2.

Ms. Jastorff's absences during the last six months of her employment were as follows: On February 20, April 19, May 23, May 24, and June 4, Ms. Jastorff was absent due to illness and properly reported the absence to the employer. Under Wal-Mart's recordkeeping system, the absences nonetheless appear as "Unapproved Absences" because they were not the result of a formal request for time off pre-approved by the employer. On June 2, Ms. Jastorff left early due to illness and received treatment at a hospital emergency room. On June 7, June 10 and June 16, Ms. Jastorff was tardy due to doctor appointments and had properly notified the employer. On June 11 Ms. Jastorff was tardy due to car trouble. On June 16 and June 18, Ms. Jastorff was tardy returning from her lunch break. On April 18, May 31, June 1, June 8, Ms. Jastorff was tardy for reasons that she cannot remember.

On June 20, the employer provided with Ms. Jastorff with a paid "decision day" on which Ms. Jastorff was not expected to report for work, but was expected to contemplate her future with the employer and prepare a statement of the changes intended to make.

Ms. Jastorff established a claim for benefits that was effective July 10, 2005 and has received benefits.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Jastorff was discharged for misconduct in connection with her employment based on excessive unexcused absences.

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Because the claimant was discharged, the employer bears 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).

In order for Ms. Jastorff's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that Ms. Jastorff'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 a 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).

Based on the evidence in the record an application of the law cited above, the administrative law judge concludes that Ms. Jastorff's tardiness on April 18, May 31, June 1, June 8, June 11, June 16 (return from lunch), and June 18, and her absence on June 27, were all unexcused absences. Based on the evidence in the record and application of the law cited above, the administrative law judge concludes that all other absences during the last six months of the employment were excused absences. The administrative law judge concludes that Ms. Jastorff's seven unexcused absences during the last month of her employment were indeed excessive and that Ms. Jastorff was discharged for misconduct. Accordingly, Ms. Jastorff 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 then otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Jastorff.

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The benefits Ms. Jastorff has received to date constitute an overpayment, which Ms. Jastorff will have to repay.

#### DECISION:

The Agency representative's decision dated August 2, 2005, reference 01, is reversed. The claimant was discharged for misconduct based on excessive unexcused absences. The claimant is disqualified for benefits until she has worked in and been paid wages for insured

work equal to ten times her weekly benefits amount, provided she is then otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant. The claimant is overpaid \$ .00.

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