

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

GIL MENDOZA

Claimant

APPEAL NO. 18A-UI-03809-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART STORES INC

Employer

OC: 02/25/18

Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Walmart Stores (employer) appealed a representative's March 14, 2018, decision (reference 01) that concluded Gil Mendoza (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 19, 2018. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Suzan Nuss. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 13, 2016, as a full-time maintenance associate. The employer has an attendance policy but the claimant did not sign for receipt of a copy. The policy indicates that an employee will be terminated if he accumulates nine occurrences within a six month rolling period. The claimant could access his point totals on the employer's computer.

The claimant was having health problems. He left work early on September 26, 2017. The claimant was late arriving at work on October 28, November 3, and 18, 2017. He was absent on October 9, 15, 29, December 9, 2017, January 13, and February 12, 2018. The claimant accumulated 8.5 occurrences. The employer did not issue the claimant any warnings during his employment. In mid-January, 2018, the claimant spoke with the assistant manager about his health issues and asked for advice about his accumulating occurrences. The assistant manager suggested he take a leave of absence. The claimant spoke with a person in human resources about family medical leave. The person led him to believe that his absences had to be consecutive and could not be intermittent. He did not apply for leave.

On February 18, 2018, the claimant properly reported his absence due to illness. He was hospitalized because his blood sugar level was at 495. On February 20, 2018, the employer terminated the claimant for accumulating 9.5 occurrences.

The claimant filed for unemployment insurance benefits with an effective date of February 25, 2018. The employer participated personally at the fact finding interview on March 13, 2018, by Christine Todd.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be

based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on February 18, 2018. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's March 14, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs