

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA L MCDOWELL
Claimant

APPEAL NO. 08A-UI-09257-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 12/23/07 R: 04
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) filed an appeal from a representative's decision dated October 2, 2008, reference 02, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on October 28, 2008. Pamela L. McDowell (claimant) participated. The employer participated by Joesph McCulley, former assistant manager. Exhibits One through Four were received into evidence.

ISSUE:

At issue in this matter is whether the claimant was discharged for intentional misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from July 22, 2008, until August 28, 2008, as a part-time third-shift stocker.

The claimant discontinued reporting to work after August 28, 2008, because the repetitious nature of the lifting that her job required caused back and shoulder pain. Ms. McDowell called in to the company's attendance line on the first night of absence to report her impending absences. The claimant at that time spoke to "Courtney," a management individual, who stated to the claimant that the claimant would be placed on "leave of absence." Courtney further stated that she would "take care of it." After approximately two weeks, Ms. McDowell telephoned the company to verify that she had been placed on a leave of absence. After checking the claimant's status, Ms. McDowell was informed that she had been terminated from employment.

It is the employer's position that Ms. McDowell was discharged under company policy for failing to report for scheduled work for three consecutive days without providing notification as required and that company records did not reflect any disability on the part of the claimant at the time of hire.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that the claimant was discharged for intentional disqualifying misconduct. It does not.

The evidence in the record establishes that the claimant called in on her first night of absence to report that she would not be able to be at work because of a back and shoulder problem and that the claimant was specifically informed by a company management representative that the claimant would be placed on "leave of absence" and that the representative would "take care of it." The claimant was reasonable in her belief, based upon those statements, that she had no further obligation to call in on a daily basis. The claimant followed a reasonable course of action, however, by calling approximately two weeks later to ensure that all necessary paperwork had been completed. At that time, the claimant was informed that she had been discharged from employment. The administrative law judge thus concludes that the claimant did not intentionally violate the company's attendance or notification policy.

In this matter, the claimant appeared personally and provided firsthand sworn testimony. In contrast, the evidence supplied by the employer is hearsay in nature. Although hearsay evidence is admissible in administrative proceedings, it cannot be accorded the same weight as sworn direct testimony. The administrative law judge finds the claimant to be a credible witness and finds that her testimony is not inherently improbable.

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.

For the reasons stated herein, the administrative law judge concludes that intentional disqualifying misconduct on the part of the claimant has not been shown. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated October 2, 2008, reference 02, is affirmed. The claimant was dismissed under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw