

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZACHARY R GRANT
Claimant

APPEAL NO. 14A-UI-07749-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 07/06/14
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Zachary Grant (claimant) appealed a representative's July 23, 2014 (reference 01) decision that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Wal-Mart Stores (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 19, 2014. The claimant participated personally. The employer did not provide a telephone number where it could be reached and, therefore, did not participate in the hearing. The claimant offered and Exhibit A 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 May 28, 2013 as a full-time maintenance worker. The claimant signed for receipt of the employer's handbook. The employer issued the claimant two or three verbal warnings for attendance. The employer notified the claimant that further infractions could result in termination from employment.

The employer told the claimant he could take personal time if he needed it and properly reported his absences. The claimant requested and was granted three days of personal time when he and his wife of eight years were having some issues between October and April 2014. The claimant properly reported his absence due to a sprained knee, a virus, and problems with his immune system. Each time the claimant provided a doctor's note for his absence but the employer told the claimant it did not accept doctor's excuses. The claimant also properly reported his absence in April 2014 to care for his wife who was pregnant and became ill. Her doctor's note indicated she needed someone to care for her. In April 2014 the claimant's three-year-old was hospitalized twice. The claimant properly reported he would be absent to care for the child. On July 4, 2014 the claimant's car broke down in Clinton, Iowa. The claimant properly reported he could not appear for work. The employer terminated the claimant on July 8, 2014.

The claimant is a full-time student at Scott Community College.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). 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). In light of good faith effort, absences due to inability to obtain child care for sick infant, although excessive, did not constitute misconduct. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The claimant was warned that further unexcused absences could result in termination of employment. The claimant requested and was granted personal time off by the employer. All of the claimant’s absences that were due to his person medical issues do not amount to job misconduct because they were properly reported. They were not willful or deliberate misconduct. The same can be said for his care of his hospitalized three-year-old. The two absences that remain are the ones where he cared for his sick wife and his transportation issue. Two absences in more than a year are not excessive. The employer did not participate in the hearing and, therefore, provided no evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The issue of whether the claimant is able and available for work is remanded for determination.

DECISION:

The representative’s July 23, 2014 (reference 01) decision is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed. The issue of whether the claimant is able and available for work is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/can