

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CODY R MERICLE
Claimant

APPEAL NO. 18A-UI-04787-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 03/25/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Walmart (employer) appealed a representative's April 13, 2018, decision (reference 01) that concluded Cody Mericle (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 May 11, 2018. The claimant participated personally. The employer participated by Shannon Ferguson, Store Manager. 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 May 4, 2016, and at the end of his employment he was working as a full-time overnight dairy/frozen stocker. On May 4, 2016, at the claimant's orientation, an employee talked to the claimant about the attendance policy in detail. On October 15, 2016, the employer updated the attendance policy in unknown ways. The claimant did not sign for receipt of the new policy and was not trained on the new policy.

During his employment the employer did not issue him any written warnings. On January 19, 2018, the store manager talked to him about his absences after she discovered he was not truthful regarding the reasons for two of his absences. In response, she erased those two absences from his record. The employer told the claimant that if he accumulated nine absences in a rolling six month period he would be terminated. At that point, he had five attendance occurrences.

The claimant was tardy for work on October 16, and December 9, 2017. He left early on October 12, 26, 2017, and January 23, 2018. He was absent due to personal issues on November 3, 2017, February 9, 2018, and March 18, 2018. He properly reported his absence due to illness on October 13, 2017, March 23, and 24, 2018. The claimant provided his

immediate supervisor with a doctor's note for March 23 and 24, 2018. His doctor diagnosed him with an upper respiratory infection.

The claimant worked the overnight shift ending March 26, 2018. On March 26, 2018, the employer terminated the claimant for accumulating 10.5 attendance points in his last six months of employment.

The claimant filed for unemployment insurance benefits with an effective date of March 25, 2018. The employer participated personally at the fact finding interview on April 9, 2018, by Rex Toney.

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 absenteeism was a properly reported medical issue that occurred on March 23 and 24, 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 April 13, 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