

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

HERBERT WHITE
2026 MERLE HAY RD
DES MOINES IA 50310-1051

WAL-MART STORES INC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-04720-JTT
OC: 03/26/06 R: 02
Claimant: Respondent (1)

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the April 19, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 17, 2006. Claimant Herbert White participated. Support Manager Becky Majors represented the employer. 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: Herbert White was employed by Wal-Mart as a full-time maintenance employee from August 12, 2005 until February 26, 2006, when Assistant Managers Brad Rockers and Kelly Meek discharged him. Mr. White was assigned to an overnight shift, 10:00 p.m. to 7:00 a.m.

The final incident that prompted the discharge occurred on the morning of February 26. The maintenance crew team was scheduled to take a 15-minute break together at 5:00 a.m. At 4:54 a.m., Mr. White commenced his break by going to the dairy section to see whether there was anything he wanted to purchase. Mr. White did not purchase anything, but went with a coworker to the front registers and read a magazine while the coworker made his purchase. Mr. White and the coworker then went to the break room. Assistant Managers Brad Rockers and Kelly Meek were timing Mr. White's break and noted that Mr. White emerged from the break room at 5:21 a.m. Support Manager Becky Majors also observed Mr. White emerge from the break room at 5:21 a.m. Mr. White's 15-minute break had lasted 27 minutes. The assistant managers were monitoring Mr. White because Support Manager Becky Majors had earlier observed Mr. White and a coworker playing with a toy instead of working.

Mr. White had been reprimanded for taking an extended break on one prior occasion. On November 22, Mr. White clocked back in from his lunch break, noticed some friends near a game display case, and then stopped to chat with his friends instead of immediately returning to work. A member of the management team observed that Mr. White was not working and directed him to return to his duties. Mr. White had clocked in at 2:58 a.m. and the manager observed him talking to his friends at 3:09 a.m. As part of this reprimand Mr. White was given a "decisionmaking" day and was warned that another similar incident would result in termination of his employment.

Mr. White's other attendance issues during 2006 were as follows. Mr. White was absent for illness properly reported to the employer on January 1 and 18 and February 11 and 15. On January 31, Mr. White was absent for personal reasons. On February 6, Mr. White was tardy.

The employer considered only the two extended breaks in making its decision to discharge Mr. White.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. White was discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

In order for Mr. White's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 that the most 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).

The evidence in the record establishes that Mr. White took an extended break on February 26 and returned to his duties 12 minutes late. Mr. White was on the clock at the time. The evidence in the record indicates that Mr. White was tardy in reporting back to his duties on November 22. On that occasion, Mr. White returned to his duties 11 minutes after he clocked

back in. Mr. White's behavior violated the employer's break policy and time use policy and demonstrates poor work performance. Though the decision to discharge Mr. White for the behavior was within the discretion of the employer, the behavior at issue does not rise to the level of substantial misconduct that would disqualify Mr. White for unemployment insurance benefits.

Even if the administrative law judge treats the extended break as an instance of unexcused tardiness, that instance and Mr. White's unexcused absences were not excessive and, therefore, would not disqualify Mr. White for unemployment insurance benefits. Mr. White's only other unexcused absences during 2006 had been on January 31, when he was absent for personal reasons, and February 7, when he was tardy.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. White was discharged for no disqualifying reason. Accordingly, Mr. White is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. White.

DECISION:

The Agency representative's decision dated April 19, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/kkf