

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

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WAL-MART STORES INC
C/O THE FRICK COMPANY
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04O-UI-08153-S2T
OC: 05/09/04 R: 03
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 Stores (employer) appealed a representative's May 21, 2004 decision (reference 01) that concluded Melissa Griffin (claimant) was discharged and there was no evidence of willful or deliberate misconduct. A hearing was held on August 30, 2004, following due notice pursuant to Remand Order of the Employment Appeal Board dated July 27, 2004. The claimant was represented by Elmer Freeman, and participated personally. The employer participated by Chad Henderson, Assistant Manager; and Danielle Hoppes, Customer Service Manager.

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 July 8, 1999, as a full-time cashier and people greeter. The claimant received a decision-making day written warning on June 19, 2003, for her attendance. The claimant was absent due to illness in April 2004, and properly reported her absence.

The claimant had a bad back and the employer was on notice of the claimant's condition. The employer had the claimant working as a greeter on May 8, 2004, due to her condition. Her back hurt so she was standing near a garbage can where she could lean when she was in pain. Sometimes she turned away from the door when she needed to write something down relating to the job. The employer terminated the claimant on May 8, 2004, for failing to properly greet people by leaning on a garbage can and turning away from the door.

A hearing was held in this matter on June 23, 2004, in which the employer told the administrative law judge that the claimant was terminated for attendance issues.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant was discharged for misconduct due to absenteeism. For the following reasons the administrative law judge concludes she was not.

871 IAC 24.32(1)a, (8) provide:

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).

(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 in April 2004. The claimant's absence does not amount to job misconduct because it was properly reported.

The second issue is whether the claimant was discharged for misconduct due to her job performance. For the following reasons the administrative law judge concludes she was not.

Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant was not warned that she was not allowed to lean on the garbage can to support her back or to turn away from the door to write when her job required she write. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 21, 2004 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/kjf