

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAMIKA T HARRIS

Claimant

APPEAL NO. 090-UI-17552-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 09/15/09

Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 15, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 4, 2010. Claimant participated. Employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Shamika Harris.

This case had been remanded by the Employment Appeal Board for a second hearing since the claimant had not received notice of the first hearing.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked at a Wal-Mart store in Davenport, Iowa. She had been employed there since November 6, 2007, as a full time sales floor associate. She was terminated on July 20, 2009, for violation of the employer's attendance policy. The employer's policy required termination if seven points were accumulated. The claimant left work on July 17, 2009, and called in an absence for July 18, 2009. These events led to the seven points. The claimant was aware of the employer's policies.

The majority of the claimant's absences were due to situations involving her children and not to personal illness. The final absence that led to termination was due to problems with her children.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Absence due to matters of "personal responsibility" is considered unexcused. See Harlan v. IDJS, 350 N.W. 2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct. The employer did not participate in the hearing.

The claimant testified that the majority of her absences were due to personal problems involving her children. Some of her absences were of an emergency nature since one or both children were being harassed and bullied by others. The claimant would be called at work concerning these situations. On July 17, 2009, the claimant was called and informed that one of her children had been shot in Cedar Rapids. She had to go to Cedar Rapids. Although the initial report about her son's injury was untrue, there was no way she could have known that at the time. The claimant did notify her employer when she would be absent.

The employer did not participate in the hearing and it is unknown exactly how and when the claimant's attendance points were accumulated. The employer had the burden of proof to show misconduct. In this case, there is insufficient evidence to conclude that the claimant had excessive unexcused absenteeism. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated September 15, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs