IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DIANE M JENSEN
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 08A-UI-07065-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/29/08 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's July 24, 2008 decision (reference 01) that concluded Diane Jensen (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 19, 2008. The claimant participated personally. The employer participated by Adam McMillin, Store Manager, and Connie Ehlers, Personnel Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 August 10, 1992, as a full-time dry grocery department manager. The employer had a policy that states an employee must report her absences by calling an 800 number, receiving an incident number, being transferred to the store and speaking to a member of management. On March 6, April 4, and May 4 and 5, 2008 employer issued the claimant warnings for absenteeism. The absences were mostly for properly reported illness. Two absences were for working an approved but altered schedule. The claimant requested and in June 2008, was granted Family Medical Leave (FMLA) for migraine related absences. The employer told her to report her absences by calling the store directly and speaking to a member of management.

On June 26, 2008, the claimant had a migraine. She called the store directly and asked to speak to a member of management. The person who answered the telephone did not identify herself or offer to transfer the claimant. The person answering asked for the claimant's name. By doing so the claimant assumed she was speaking to a member of management. The claimant gave the proper information and the call ended. On June 27, 2008, the employer terminated the claimant for failure to follow proper call in procedures.

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:
>
> 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide any evidence at the hearing of job-related misconduct. The claimant followed the employer's procedures as best she could. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's July 24, 2008 decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs