

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TABATHA D HARRAH
Claimant

APPEAL NO. 16A-UI-10592-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/28/16
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's September 19, 2016, decision (reference 01) that concluded Tabatha Harrah (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 October 13, 2016. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Scott McLin, Assistant Manager. Exhibit D-1 was received into evidence. The employer offered and Exhibit 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 July 18, 2008, as a full-time cashier. The claimant signed for receipt of the employer's new attendance policy on March 1, 2016. The policy requires employees to report their absences to a third party. Employees are assessed one point for every absence and one-half point for tardiness or leaving early of ten minutes or less. If one does not properly report an absence, one is assessed four points. No warnings are issued to employees. Employees must self-monitor. If an employee accumulates nine points in a rolling six month period, she will be terminated.

On March 13, 2016, the claimant clocked in late and was assessed one-half point. On March 31, 2016, the claimant left early and was assessed a point. The claimant properly reported her absence due to a medical reason on March 21, April 22, 29, June 8, July 1 and 12, 2016. On August 31, 2016, the claimant called her assistant manager and explained that she was "kicked out" of her house. The assistant manager told her she would only accrue one point for her absence. The claimant did not call the third party company, the employer listed the claimant as a "no call no show", and assessed her four points. The employer terminated the

claimant on August 31, 2016, because her attendance points exceeded nine points in six months.

The claimant filed for unemployment insurance benefits with an effective date of August 28, 2016. The employer participated at the fact finding interview on September 16, 2016, by Susan Deaver.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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 has established that all but three of the claimant's absences were due to medical reasons and properly reported. None of those can constitute job misconduct. That leaves us with one incident of tardiness of ten minutes or less in March 2016, one incident of leaving early in March 2016, for an unknown reason, and the final incident. The last absence was reported to an assistant manager. The assistant manager told the claimant she would receive one point. He did not instruct her to anything more. The claimant was discharged but the employer did not prove excess absences. Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The representative's September 19, 2016, 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