

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSEPH D TITCOMB
Claimant

WAL-MART STORES INC
Employer

APPEAL 16A-UI-09398-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/07/16
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Joseph D. Titcomb (claimant) filed an appeal from the August 22, 2016, (reference 01) unemployment insurance decision that denied benefits based upon the determination Wal-Mart Stores, Inc. (employer) discharged him for excessive unexcused absenteeism after being warned. The parties were properly notified about the hearing. A telephone hearing was held on September 15, 2016. The claimant participated and was represented by Attorney Andrea Buckley. The employer participated through Assistant Manager Justin Vaske. Claimant's Exhibit A was received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Department Manager beginning on February 22, 2010, and was separated from employment on August 8, 2016, when he was discharged.

In March 2016, the employer distributed a new attendance policy. It alerted the employees that it was their responsibility to track their attendance and after nine attendance points the employee would be discharged. The employees accrued one attendance point for each day missed and a half a point when they were more than nine minutes late to work. The employees were also instructed to call a toll free number to report any absences and they would then be transferred to their store to report the absence to store management.

The claimant was tardy to work five times between March 13 and March 18, 2016. He did not notify the employer of his tardiness and there is no explanation for his tardiness. He missed a full day of work on March 24, 2016 due to weather as travel was not advised by Iowa Department of Transportation on the roads he used to commute to work. The claimant contacted the employer to notify it of his absence.

The claimant was tardy on April 1, 2016. He did not notify the employer of his tardiness and there is no explanation for his tardiness. The claimant left work early on April 20, 2016. He left work as the employer had stated it was trying to cut hours and he notified his supervisor he was leaving. The claimant missed work on April 22, 2016 due to illness. He notified the employer and reported his absence that day.

The claimant was tardy seven times between April 28 and July 22, 2016. He did not notify the employer of his tardiness and there is no explanation for his tardiness. After arriving at work on July 22, 2016, the claimant met with the Store Manager to discuss his attendance as he knew he would be at or over nine points and he could potentially lose his job. The Store Manager told the claimant not to say anything and he would talk to the claimant's supervisor.

On August 2, 2016, the claimant was 31 minutes late for work. He did not notify the employer of his tardiness and there is no explanation for his tardiness. On August 5, 2016, the claimant was 12 minutes late to work. He did not notify the employer of his tardiness and there is no explanation for his tardiness. The claimant was discharged on August 8, 2016 for excessive absenteeism under the employer's policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes

misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant's absences were excessive. He was absent 18 times over a five month period. The next issue is whether the absences were unexcused. The claimant's absences on March 24, April 20, and April 22, 2016 were excused as they were for illness or other reasonable grounds and were properly reported. That leaves 15 absences in which the claimant did not properly report his absence and there is no evidence to suggest they were for good cause reasons. The claimant knew his job was in jeopardy after his July 22, 2016 absence and he still continued to be absent from work. The employer has met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are denied.

DECISION:

The August 22, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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