

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KERRY KING
Claimant

WALMART INC
Employer

APPEAL 21A-UI-10275-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/14/21
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant, Kerry King, filed an appeal from the April 8, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he was discharged due to excessive absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 25, 2021. The claimant participated. The employer participated through Manager Crystal Moore. Official notice was taken of the agency records.

ISSUE:

- Whether the claimant's separation was due to excessive absenteeism constituting disqualifying willful misconduct?
- Whether the claimant was able and available for work after she was separated from employment?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as an overnight stocking team associate from June 10, 2013, until this employment ended on March 13, 2021, when she was terminated. The claimant worked a set schedule from 10:00 p.m. to 7:00 a.m. The claimant's immediate supervisor was Manager Crystal Moore.

The employer has an attendance policy. The attendance policy requires the employee to report an expected absence to the manager on duty or through the use of an application specifically created to report absences. If an absence is due to intermittent Family Medical Leave Act leave, then the employee is required to report the absence to Sedgwick. If an employee contacts Sedgwick, then Ms. Moore receives confirmation within 24 hours.

Under the attendance policy, the types of absences lead to the accrual of the corresponding points. An employee leaving 30 minutes to an hour earlier than their shift ends, results in receiving half of a point. An employee leaving more than an hour prior to the end of the shift results in receiving a point. An absence which is properly reported prior to the start of the shift results in a point. An employee's failure to report an expected absence prior to the start of their shift results in an employee receiving three points. If an absence is excused by intermittent FMLA, then no points are issued to the employee for that absence. If an employee accrues more than five points, then they are terminated. The claimant had access to the attendance policy through the use of the Wire, the employer's Intranet system.

The claimant uses intermittent FMLA when one or both of her two disabilities, diabetes and anxiety, flare up.

On December 14, 2020, the claimant accrued half of a point because she left 30 minutes to an hour earlier than her shift was scheduled to end.

On January 11, 2021, the claimant received a full point because she left work more than an hour before her shift ended. The claimant explained that a team lead told everyone on the shift to go home early on that date.

On January 12, 2021, the claimant received a full point because she was absent for that day. The employer's records do not show the claimant called the store to report the absence. The claimant explained that she obtained preapproval from Store Manager Sue Rindels to use vacation time for that day, but it was never corrected in the system by the Human Resources Department.

On January 13, 2021, the claimant received a full point because she was absent on that day. The claimant properly reported that she was too ill to work that day.

On February 3, 2021, the claimant received a full point because she was absent on that day. The claimant properly reported that she was too ill to work that day.

On February 16, 2021, the claimant received a full point because she was absent on that day. The claimant properly reported that she was too ill to work that day.

On February 21, 2021, the claimant received a full point because she was absent on that day. The claimant properly reported that she was too ill to work that day.

On February 25, 2021, the claimant received a full point because she was absent that day. The claimant properly reported that she was too ill to work that day. During the hearing, Ms. Moore conceded that this absence should have been removed because she received confirmation from Sedgwick that it was covered by intermittent FMLA.

On March 4, 2021, the claimant received a full point because she was absent on that date. The claimant properly reported that she could not make it to work on that day because of the weather. The claimant explained that she lives 40 to 45 minutes away from the employer's premises.

On March 7, 2021, the claimant received a full point because she was absent on that date. The claimant properly reported to the store that she was too ill to work that day.

On March 13, 2021, the claimant and Ms. Moore had a meeting regarding her attendance points. During the meeting, Ms. Moore told the claimant she had not received confirmation emails from Sedgwick regarding times she was absent due to her intermittent FMLA. Ms. Moore gave the claimant two days to get the confirmation emails. Over the next two days, the claimant attempted to get the confirmation numbers from Sedgwick, but she could not get a response.

On March 15, 2021, Ms. Moore terminated the claimant because she had not provided the confirmation numbers from Sedgwick regarding absences she attempted to excuse through the use of intermittent FMLA.

The claimant was not issued formal discipline prior to her termination.

Since she has been discharged, the claimant has been looking for other retail jobs in the surrounding area. The administrative record KCCO shows the claimant has been making the requisite employer contacts for each week that she made weekly claims. The claimant was able to work if she received work during the time she made weekly claims.

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. The administrative law judge further concludes the claimant was able and available for work after her separation from employment. Benefits are granted, provided she is otherwise eligible.

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.

Iowa Admin. Code r.871-24.32(8) provides:

(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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) (emphasis added); 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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. This is not a case in which the employer was not notified about absences. It is undisputed the claimant properly informed the store that she was ill on March 7, 2021. As a result, the final absence cannot be considered misconduct and the employer cannot show she was terminated for a current act of misconduct to satisfy Iowa Admin. Code r.871-24.32(8).

Alternatively, the employer contends the claimant should have provided confirmation numbers from Sedgwick. The claimant credibly testified she attempted to obtain those confirmation numbers for the days in which she was absent. Indeed, the claimant obtained the confirmation number for the incident on February 25, 2021 and she was still assessed a point for that day. Given that Ms. Moore does not even question whether the claimant was ill on the days she states she used intermittent leave, the administrative law judge cannot find the inability to get confirmation emails in time to be misconduct.

The administrative law judge will now evaluate whether the claimant was able and available for work effective March 15, 2021.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. *Illness, injury or pregnancy.* Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

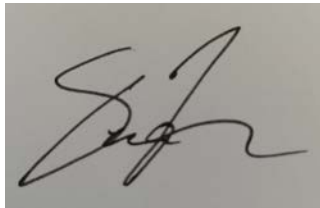
Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The claimant began searching for work immediately after her separation from employment. Although the claimant still requires the use of intermittent leave, these disabilities do not flare up enough to disrupt her ability to work.

DECISION:

The April 8, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to non-disqualifying conduct. The claimant was able and available for work effective March 15, 2021. Benefits are granted, provided she is otherwise eligible.



Sean M. Nelson
Administrative Law Judge
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July 12, 2021
Decision Dated and Mailed

smn/scn