

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RYAN S KNUTSON
Claimant

WALMART INC.
Employer

APPEAL 18A-UI-10410-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/16/18
Claimant: Appellant (2)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Ryan Knutson, Claimant, filed an appeal from the October 8, 2018 (reference 01) unemployment insurance decision that denied benefits because he was discharged from work with Walmart, Inc., due to excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on November 15, 2018 at 1:00 p.m. Claimant participated. Employer participated through Brad Sartin, Hearing Representative. Other witnesses included Jonathan Adams-Garcia, Member Experience Manager; Hazira Jukic, Personnel Manager; and Hillary Tanney, Member Service Supervisor Lead. Employer's Exhibit 1 was admitted.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a Member Service Leader from October 12, 2017 until his employment with Walmart Inc. ended on September 12, 2018. (Jukic Testimony) Claimant's direct supervisor was Jonathan Adams-Garcia, Member Experience Manager. (Jukic Testimony)

Employer has an attendance policy, which defines unexcused absences, explains how the absences are tracked, sets forth the progressive disciplinary process for absences and states the employees' responsibility to provide notice to the employer of absences. (Jukic Testimony) The policy is in the employee handbook; claimant received a copy of the handbook and training on the attendance policy during orientation. (Jukic Testimony)

Claimant clocked out an hour prior to the scheduled end time of his shift on September 8, 2018, in order to attend a football game. (Jukic Testimony) Claimant did not obtain prior approval to leave work early. (Adams-Garcia Testimony) Claimant received prior written warnings regarding absenteeism on February 3, 2018 and April 3, 2018 and a prior written warning

regarding job performance on May 9, 2018. (Exhibit 1) All three warnings state that further violations of company policy may result in termination of claimant's employment. (Exhibit 1) Claimant knew that his job was in jeopardy. (Claimant Testimony)

After receiving the written warning regarding absenteeism on April 3, 2018, claimant accrued the following absences:

- May 19, 2018, claimant left work early for an unknown reason. (Claimant Testimony)
- May 20, 2018, claimant was absent from work because he switched shifts with another employee. (Claimant Testimony; Tanney Testimony) Claimant and the other employee noted the switched shifts on a hard copy of the work schedule, initialed the change and notified their manager – as was common practice.
- May 31, 2018, claimant left work early for an unknown reason. (Claimant Testimony)
- June 22, 2018, claimant was late to work for an unknown reason. (Claimant Testimony)
- July 20 and 27, 2018, claimant was late to work to avoid working more than 40 hours in a pay period. (Claimant Testimony) It was common practice for member service supervisors to adjust their hours by arriving late or leaving early to avoid overtime. (Claimant Testimony; Tanney Testimony) There was no formal process; the employees would simply inform their managers. (Claimant Testimony; Tanney Testimony)
- August 5, 2018, claimant was absent from work because he switched shifts with another employee. (Claimant Testimony; Tanney Testimony) Claimant and the other employee followed the same process outlined above. (Claimant Testimony)

There are other employees with a greater number of unexcused absences than claimant and those other employees have not been terminated. (Claimant Testimony; Tanney Testimony; Adams-Garcia Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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.

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, 11 (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).

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*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Claimant's act of leaving work early on September 8, 2018, was not for reasonable grounds and was not properly reported; therefore, this absence is unexcused. This absence constitutes a final act of misconduct. Furthermore, claimant's absences on May 19th, May 31st and June 22nd are unexcused because they were not for reasonable grounds (as the reason for the absence is unknown). Three unexcused absences in five months after receiving two warnings regarding attendance are excessive. However, claimant's excessive unexcused absences are not disqualifying, job-related misconduct, because other employees with a greater number of absences were not disciplined. The claimant seems to have been the subject of the disparate application of the employer's absenteeism policy, which cannot support a disqualification from benefits.

DECISION:

The October 8, 2018 (reference 01) unemployment insurance decision is reversed. Benefits are allowed, provided claimant is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/scn