IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

QUINTEL M DAVIS Claimant **WAL-MART STORES INC** Employer	**APPEAL 16A-UI-07473-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/22/16** **Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 16, 2016 (reference 03) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for excessive unexcused absenteeism after being warned. The appeal was filed on July 6, 2016. The appeal was timely. The parties were properly notified of the hearing. A telephone hearing was held on July 26, 2016. The claimant, Quintel M. Davis, participated personally. The employer, Wal-Mart Stores Inc., participated through Assistant Manager Jesus Gonzalez. It is noted that Mr. Gonzalez disputed that the claimant who testified at the hearing was actually Mr. Davis. The person who testified at the hearing did testify that they were Quintel Davis.

ISSUES:

Was the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision dated June 16, 2016 (reference 03) was mailed to the appellant's address of record on June 16, 2016. The decision stated that the claimant had until June 26, 2016, or if this date was a Saturday, Sunday, or legal holiday, until the next working day, to file an appeal. This date was on a Sunday so the appeal deadline was extended until the following day on June 27, 2016. The appellant did not receive the decision until after the appeal deadline had passed. Claimant immediately filed an appeal upon receipt of the decision.

Claimant was employed full time as a produce associate. He was employed from October 24, 2015 until May 20, 2016. Claimant's job duties included stacking products and assisting customers.

The employer has an attendance policy stating that an employee must notify management within thirty minutes prior to their shift if they are unable to attend or will be tardy. The claimant

received a copy of this written policy. The policy further states that if an employee has nine occurrences of absenteeism that they will be discharged from employment.

Claimant had received four verbal warnings regarding his attendance and failure to adhere to the policy requiring him to be at work when scheduled. The most recent verbal warning prior to the final incident occurred in April of 2016.

Claimant was absent from work on the following dates that he was scheduled to work and for the following reasons: March 27, 2016 (unknown reason); April 2, 2016 (out of town visiting family); April 11, 2016 (vehicle was broken and had no transportation); April 12, 2016 (vehicle was broken and had no transportation); May 5, 2016 (vehicle was broken and had no transportation); May 8, 2016 (vehicle was broken and had no transportation); May 9, 2016 (vehicle was broken and had no transportation); May 15, 2016 (unknown reason); May 16, 2016 (unknown reason). Claimant did call to report his absences on all but two occasions.

Claimant was discharged from employment when Mr. Gonzalez left the claimant a voicemail message stating that he was being discharged for violation of the absenteeism policy. Claimant had no written discipline and no other verbal warnings for any other policy violations other than the four verbal warnings for absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to timely appeal the unemployment insurance decision because the decision was not received in a timely fashion. The appellant did not receive the decision until after the time period to file a timely appeal had already passed. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appeal was filed within a reasonable time thereafter. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant is eligible to receive unemployment insurance benefits based upon the separation from employment. As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment for job-related misconduct. As such, benefits are withheld.

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(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or

> disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). 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." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as **transportation**, lack of childcare, and oversleeping is not considered excused. *Id*. at 191 (emphasis added). Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

In this case, the claimant had received four verbal warnings regarding his absenteeism. The claimant knew that he needed to come to work when scheduled and was aware of the employer's absenteeism policy.

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.*, 321 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).

In this case claimant had nine unexcused absences in less than a two-month time period. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident was not excused. The claimant's unexcused absenteeism is job-related misconduct. Benefits are withheld.

It is noted that Mr. Gonzalez testified that he did not believe that the person testifying at the hearing as Quintel Davis was actually Quintel Davis. The person purporting to testify as Quintel Davis confirmed their identity as Quintel Davis. This disagreement was not relevant as the claimant testifying as Quintel Davis did confirm the dates of the absences and reasons for the absences.

DECISION:

The June 16, 2016 (reference 03) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as he is deemed eligible.

_____
Dawn Boucher
Administrative Law Judge

_____
Decision Dated and Mailed

db/