IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KIMBERLY D ROBERTS Claimant **WAL-MART STORES INC** Employer	**APPEAL 15A-UI-02647-KCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/25/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 19, 2015, (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 3, 2015. The claimant participated and was represented by attorney Benjamin R. Roth. The employer was represented by Michele Hawkins and participated through witness Clarissa Videgar. Dillon Lancaster was sworn in on behalf of the employer but was not called to testify. Exhibits 1 – 5 were received as evidence.

ISSUE:

Was the claimant discharged for work-related, disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a grocery sales associate and was separated from employment on January 23, 2015, when her employment was terminated.

The employer has a policy about attendance and excessive breaks but never specifically issued a warning that her job was in jeopardy for those reasons. (Exhibits 2-3)

The claimant was discharged based on the employer's assertion that on January 17, 2015, she took a lunch break that exceeded the permitted 30 minutes and she took another break in excess of 15 minutes. The employer submitted a document and presented a witness that testified the claimant took lunch on January 17, 2015 from 2:38 p.m. until 2:47 p.m., which exceeded the 30-minute lunch period. The time period identified is actually 9 minutes. Upon further questioning, employer's witness Videgar was unable to identify what she thought was the correct time period that the claimant took for lunch on the day in question, although she thought the claimant took a 40-minute lunch. (Exhibit 1, pg. 3) The remaining witness for the employer was not called to address this discrepancy.

On January 17, 2015, the claimant took a break at 5:00 p.m. that exceeded the 15 minutes permitted for employees. The claimant has a work-related injury for which she had a physician's release to work with restrictions that include resting when she experienced pain or muscle spasms. On that date, the claimant reported to Videgar and store manager Scott Graham that she experienced sudden neck pain after she heard a popping sound in her neck while she was working. She also reported feeling nauseated and needed to sit down. Later, the claimant asked Graham if she could go home early due to pain. Graham denied her request.

The claimant has a pending workers' compensation claim with the employer based on an injury she sustained in September 2014. She is requesting more treatment. She submitted her physician's work releases, with specified limitations, to the employer each time that she received a new medical release. Videgar acknowledged receipt of physician statements/releases.

The claimant received no warnings, in light of her work-related injury, regarding taking lunch and regular breaks that exceeded the employer's stated policy. Her physician recommended rest breaks when she experienced pain or nausea. The employer was aware of the physician's statement.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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. *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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job

insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper, supra.*

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The February 19, 2015, (reference 03) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs