

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AUSTEN N STOCK
Claimant

WALMART INC
Employer

APPEAL 19A-UI-08332-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/15/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On October 24, 2019, the employer filed an appeal from the October 15, 2019, (reference 01) unemployment insurance decision that allowed benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 14, 2019. Claimant participated personally and through his mother, Julie Nemmers-Stock. Employer participated through assistant manager Michael Davis. Assistant manager Zachary Reuter observed. Employer's Exhibits 1 through 5 were received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on September 7, 2016. Claimant last worked as a full-time general merchandise support supervisor. Claimant was separated from employment on September 9, 2019, when he was terminated.

Employer has an attendance policy stating that five attendance points will result in termination. The written policy requires employees to report absences or tardiness at least one hour prior to the start of the shift. The policy states that failure to do so will result in the absence or late arrival counting as a "no call/no show." The policy states:

If you are absent from a scheduled shift and do not report the absence, and your absence is not authorized, you will receive a total of two (2) occurrences/points for failing to report, and one (1) for the absence itself, resulting in a total of three (3) occurrences/points. If you do not report an absence on time, and after the fact your

absence is authorized according to this policy (e.g., use of Protected PTO) or your relevant state-specific authorized absences, you may still be held accountable for the two (2) occurrences for the no call/no show.

Claimant was aware of the policy.

Claimant had attendance and reporting issues on an almost constant basis. However, employer did not follow its own written attendance policy. Employer considered a report of an absence any time before or during the shift to be properly reported and very rarely gave claimant attendance points.

By September 6, 2019, claimant had 4.5 attendance points. Claimant was given a half point for an incident of tardiness on August 27, 2019. The other four points were due to absences for illness that employer considered properly reported.

Claimant was aware of his point total and that his job was in jeopardy.

On September 7, 2019, claimant was absent due to illness. Claimant sent a text message to assistant manager Megan Wynn after the start of his shift. Wynn authorized his absence. Employer gave claimant one attendance point for the absence.

Employer terminated claimant's employment on September 9, 2019, for exceeding his allotted attendance points.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,010.00, since filing a claim with an effective date of September 15, 2019, for six weeks until the week ending November 9, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview.

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.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

In this case, claimant’s last absence was due to illness. Claimant did not report the absence in accordance with employer’s written policy, but employer apparently did not penalize him for that. Even if the absence is considered improperly reported for purposes of unemployment law, claimant had only one other attendance event during his last six months of employment that is considered unexcused under the law and by the employer—the tardiness on August 27, 2019. Two unexcused attendance events within six months of employment is not considered excessive.

If employer had actually enforced its attendance policy the way it is written, this would be a much different case. But it did not. Therefore, employer failed to establish it terminated claimant for misconduct.

Because claimant’s separation from employment does not disqualify him from receiving benefits, the issues regarding overpayment are moot and will not be discussed further in this decision.

DECISION:

The October 15, 2019, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.



Christine A. Louis
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November 22, 2019
Decision Dated and Mailed

cal/scn