

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

KELLI M MCELWEE
Claimant

APPEAL NO. 07A-UI-00318-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 12-10-06 R: 02
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 29, 2006, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on January 25, 2007. Claimant participated. Employer participated through Jason Bachens.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time overnight stocker from August 8, 2003 until December 8, 2006, when she was discharged for attendance issues. Store manager Leif Fogo agreed to let her work around her husband's schedule, who also worked at that location. Claimant had filed a harassment report against mother/daughter associates who were close friends with Dan Wells. Wells had told them he would work to remove claimant from employment. On December 7 and 8 claimant was not scheduled to work but she did so on December 8 upon the request of Wells, who fired her two hours into her shift for alleged absenteeism on December 1, 2, 3, and 7. She told Bachens on December 1 she would not be there on December 2 since her husband's schedule had changed. Whenever there was a schedule change, she gave notice to overnight managers Bachens and Wells. All other absences were either related to scheduling changes because of her husband's conflicting or overlapping work schedule, her absence related to reported illness, and two unconfirmed instances of tardiness.

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 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 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.

871 IAC 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.

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 v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

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. In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Because the final absences for which she was discharged were related to properly reported schedule changes as allowed by the store manager, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The December 29, 2006, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw