

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MERRIE L JOHNSON**  
Claimant

**WAL-MART STORES INC**  
Employer

**APPEAL 16A-UI-05550-LJ-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 04/24/16**  
**Claimant: Appellant (2)**

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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 May 11, 2016 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 2, 2016. The claimant, Merrie Johnson, participated. The employer, Wal-Mart Stores, Inc., participated through Deborah Goodwin, co-manager.

**ISSUE:**

Was the claimant discharged for 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 customer service manager from November 20, 2009 until this employment ended on April 20, 2016, when she was discharged.

Under the employer's policy, any employee who accrues nine attendance occurrences within a six-month period will be discharged. Claimant was absent on the following dates: April 19, 2016; April 16, 2016; April 15, 2016; April 14, 2016; April 13, 2016; April 12, 2016; and April 9, 2016. Claimant called in and reported each of these absences to the call-in line. Claimant was absent on each of these dates because she had taken temporary emergency custody of her grandchildren. She was their sole blood relative available, and she was responsible for taking them to various medical and court appointments. Claimant testified she was looking into childcare for them but third-shift childcare is not readily available.

Claimant was late to work on April 8, 2016 because she was working with the police to take emergency custody of her grandchildren. Claimant called into the call-in line and reported that she would be late on this occasion. Claimant left early on April 7, 2016 and she came in late on April 1, 2016, both in order to avoid accruing overtime. Claimant called into the call-in line and reported these partial absences.

Claimant applied for a temporary leave of absence on April 9, 2016. She did not qualify for the leave because she did not work the requisite number of hours in the past 12 months. Claimant spoke to Goodwin on April 9 about having taken emergency custody of her grandchildren. Goodwin did not tell claimant her job was in jeopardy or that she could lose her job if her leave of absence was denied.

Claimant had custody of her grandchildren for approximately one month. They are now wards of the state.

### **REASONING AND CONCLUSIONS OF LAW:**

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

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 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). Excessive absences are not considered misconduct unless unexcused. 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* at 192. Second, the absences must

be unexcused. *Cosper* 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* at 191, or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Cosper* 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, 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). See, *Gimbel v. Emp’t Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant’s late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep’t of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

Claimant’s seven full absences are likely excessive, as they occurred within a two-week period. However, claimant had just taken temporary emergency custody of her grandchildren who were removed from an abusive home. Claimant’s husband was not the grandchildren’s biological grandfather and, therefore, the burden of caring for the children and taking them to necessary medical and legal appointments fell to claimant alone. Claimant called in and reported each of these absences, and she personally notified Goodwin as well. Claimant’s final absence related to reasonable grounds beyond a mere lack of childcare and, therefore, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed.

**DECISION:**

The May 11, 2016 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

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Elizabeth Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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