

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN J CALMER
Claimant

APPEAL NO. 16A-UI-07771-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 06/19/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's July 7, 2016, decision (reference 01) that concluded Nathan Calmer (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 3, 2016. The claimant participated personally. The employer participated by Benjamin Wagner, Co-Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 19, 2007, as a full-time toy sales floor associate. The claimant signed that he discussed the employer's attendance policy on June 19, 2007. On February 4, 2016, the employer issued the claimant a coaching for properly reporting four absences due to medical issues. The employer notified the claimant that further infractions could result in termination from employment. On March 1, 2016, the claimant signed that he discussed the employer's new attendance policy. The new policy stated that an employee could be terminated if he accumulated nine points in six months. Under the new system, no warnings would be given.

The claimant properly reported absences due to a back injury that was aggravated by his work. The third party administrator told him that his intermittent family medical leave had been exhausted. In May 2016, the third party administrator wrote him a letter stating he had only used 15-percent of his family medical leave. He showed the letter to the employer but the employer continued to assess points against him. As of the end of May 2016, the claimant had

accrued 8.5 attendance points. All of his absences were properly reported. He was absent one day when his father was hospitalized. The rest of the absences were due to his back injury. On June 13, 2016, the claimant read the schedule incorrectly and was two hours late to work. The employer terminated the claimant on June 14, 2016, for excessive absenteeism.

The claimant filed for unemployment insurance benefits with an effective date of June 19, 2016. The employer participated personally at the fact-finding interview on July 6, 2016, by Benjamin Wagner.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. In this case, the claimant's absences, save two, were properly reported and due to a medical issue. The lion's share of the absences cannot be considered misconduct.

One of the two remaining absences was because the claimant's father was in the hospital. This absence was properly reported. Likewise, this absence cannot be considered volitional. That leaves one absence, the final absence. One absence cannot be considered excessive. The employer has failed to provide evidence of willful and deliberate misconduct. The claimant was discharged but there was no misconduct.

DECISION:

The representative's July 7, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs