

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHYRELE L MAHJOUBA
Claimant

WAL-MART STORES INC
Employer

APPEAL 17A-UI-04519-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/02/17
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:

The employer filed an appeal from the April 17, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 16, 2017. Claimant participated. Employer participated through pharmacy manager Sarah Duvail. Official notice was taken of the administrative record, including claimant's benefit payment history and the fact-finding documents, with no objection.

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 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 was employed full-time as a pharmacy technician from June 28, 2011, and was separated from employment on March 30, 2017, when she was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The policy does not provide that an employee will be warned as points are accumulated. The policy provides that employees will be discharged upon receiving nine points in a rolling six month period. The employer requires employees contact the employer and report their absence at least an hour prior to the start of their shift. Employees are also required to contact the employer's third party company if they are going to use Family and Medical Leave Act (FMLA) leave for an absence. Claimant was aware of the employer's policy.

The final incident occurred when claimant left her shift early on February 14, 2017. Claimant left early because she was having severe back pain. Claimant told the employer (the pharmacist that was on duty) that she was leaving early due to her back pain. Claimant testified she called the employer's third party company and informed it she was leaving early. Claimant received one attendance point for this attendance infraction. This attendance infraction gave claimant a total of twelve attendance points. On February 19, 2017, Ms. Duvail became aware of how many attendance points claimant had accrued. Ms. Duvail told claimant she would send the information to corporate. Ms. Duvail then e-mailed the head of human resources about claimant's point total. March 30, 2017, was the next time the employer spoke to claimant regarding her attendance infractions. On March 30, 2017, the head of human resources e-mailed Ms. Duvail regarding claimant's attendance infractions. On March 30, 2017, the employer discharged claimant due to her attendance infractions.

Claimant did not have any prior disciplinary warnings for absenteeism. Claimant also had attendance infractions on: October 27, 2016, claimant left early due to an attack (shaking) due to her medication; November 6, 2016, claimant was absent due to an attack (shaking) due to her medication; November 14, 2016, claimant left early due to an attack (shaking) due to her medication and she reported it to the employer and the third party company; December 15, 2016, claimant left early due to an attack (shaking) due to her medication and she reported it to the employer and the third party company; January 5, 2017, claimant left early due to back pain and she reported it to the employer and the third party company; January 23, 2017, claimant left early due to back pain and she reported it to the employer and the third party company; January 25, 2017, claimant left early due to back pain and she reported it to the employer and the third party company; February 1, 2017, claimant was tardy due to back pain, but claimant did not call anyone to report she was going to be late; February 2, 2017, claimant left early due to back pain and she reported it to the employer and the third party company; and February 7, 2017, claimant left early due to back pain and she reported it to the employer and the third party company.

Around the end of December 2016 or the beginning of January 2017, claimant provided the employer a doctor's note to the employer regarding her back pain allowing her to use a chair. Starting in January 2017, claimant twice applied for Family and Medical Leave Act (FMLA) leave regarding her back pain. Claimant had to apply twice because her doctor told her that this doctor's office does not fill out FMLA leave paperwork. Claimant was never approved for FMLA leave for her back pain because her doctor refused to fill out the paperwork. The employer was aware claimant's back pain would force her to miss work.

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 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) *Definition.*

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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*. An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, 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.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit, supra*.

The employer did not give claimant any disciplinary warnings for absenteeism prior to her discharge. Inasmuch as employer had not previously warned claimant about the issue (absenteeism) leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. 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. Moreover, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence on February 14, 2017 was related to properly reported illness or other reasonable grounds (severe back pain), no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. It is also noted that a majority of claimant's attendance infractions were assessed due to illness, which are not considered unexcused. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Furthermore, even if it is determined that claimant's final absence on February 14, 2017 was not excused for the purposes of unemployment insurance eligibility, her final absence would still not be considered a current act of misconduct. The employer waited over thirty days to discharge claimant after her final incident of absenteeism and therefore the act for which claimant was discharged was no longer current, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The April 17, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/scn