

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY L WILLIAMS

Claimant

APPEAL 16A-UI-00504-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC.

Employer

OC: 11/29/15

Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 5, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for leaving work without permission. The parties were properly notified of the hearing. A telephone hearing was held on February 3, 2016. The claimant Timothy Williams participated and testified. The employer Wal-Mart Stores Inc. participated through manager, Nicole Uhde and assistant manager, Shane Peterson.

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 part time as an overnight produce associate from March 28, 2015, until this employment ended on December 1, 2015, when he was discharged for violating the employer's attendance policy.

In June 2015, Claimant injured his back while at work. The employer's attendance policy allows employees to have seven absences in a rolling six-month period before being terminated. Each absence must be properly reported either through a manager or the employer's hotline. The policy provides that employees are to be given verbal counseling at three absences and written coachings at four, five, and six absences. Claimant had approximately 12 absences from work between the time he injured his back and November 28, 2015. All of these absences were related to claimant's back injury and were properly reported to the employer. On November 24, 2015, claimant was issued a written warning for his attendance. This was claimant's second written warning, however, this was his first warning for attendance, as his previous discipline was for work performance. It is the employer's policy to roll all disciplinary actions together when following the progressive disciplinary policy. Claimant was warned that further absences could result in disciplinary action, up to and including termination. Claimant was absent again for reasons related to his back injury on November 28, 2015.

On November 30, 2015, claimant was scheduled to work from 10:00 p.m. to 7:00 a.m. on December 1. Claimant arrived to work late at 11:30 p.m. Shortly after he arrived at work claimant approached his supervisor, Nick Simpson to tell him he was not feeling well. Claimant clocked out of work at 11:50 p.m. Claimant testified he told Simpson he was going home. The employer denied claimant notified anyone that he was leaving. At 1:00 a.m. on December 1, 2015, Simpson phoned claimant to tell him he was being terminated for leaving during his shift.

REASONING AND CONCLUSIONS OF LAW:

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

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 of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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); *Casper*, 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.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence.

Claimant does not dispute that he was absent on the dates alleged by the employer, but states these absences were properly reported and due to an injury. There is a dispute between the parties as to whether the claimant properly reported his absence on November 30, 2015. Claimant testified he clearly indicated to Simpson that his back was bothering him and he was going home. The employer testified that claimant left work without notifying his supervisor. When the record is composed solely of hearsay evidence, that evidence must be examined

closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1).

In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). It is permissible to infer that records were not submitted because they would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. Other than claimant, Simpson is the only other individual with direct knowledge regarding the November 30 absence. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer as he was the only individual testifying who had direct knowledge of what occurred on November 30.

Even if claimant's November 30 absence was not properly reported, there was no evidence presented to show he failed to properly report his other absences. One unexcused absence is not disqualifying since it does not meet the excessiveness standard. Because his absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Even when assuming that claimant's two to three absences prior to his injury were unexcused, those combined absences do not rise to the level of excessiveness and would have only resulted in a verbal warning under the employer's attendance policy. Benefits are allowed.

DECISION:

The January 5, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/css