

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ARTHUR M ROBERTSON
Claimant

WALMART INC
Employer

APPEAL 19A-UI-05658-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/23/19
Claimant: Appellant (2)

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, Arthur M. Robertson, filed an appeal from the July 12, 2019, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on August 8, 2019. Claimant participated personally. Employer participated through Brad Klinger, merchandising manager. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed as a full-time meat wrapper/cutter until June 21, 2019, when he was discharged for “pointing out” by way of the employer’s attendance policy.

In 2019, the employer issued a new attendance policy which provided an employee was subject to discharge upon receipt of five attendance points in a rolling six month period. Points were accrued when an employee was tardy, absent or failed to properly notify the employer one hour prior to shift of an absence. The employer also discontinued providing warnings for attendance effective March 2019. Prior to the final absence, the claimant had not been warned his job was in jeopardy due to attendance. Mr. Klinger stated he had verbally discussed attendance with the claimant in late May.

The claimant was trained on the employer policy. He accumulated the following points:

June 10, 2019	3 points, No-call/no-show
May 28, 2019	1 point
May 23, 2019	1 point
May 3, 2019	1 point
April 8, 2019	½ point
March 22, 2019	1 point

The claimant's final absence was June 10, 2019. The employer had also implemented new software as part of its attendance and PTO policy. The claimant had used the employer software to request June 10, 2019 off of work. He thought he had been approved. However, he had not been, which led to the employer interpreting his absence as a no-call/no-show. When the claimant learned the request had not gone through and he was going to be assessed points, he informed Kyle Simon, who said he would "fix it". He was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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).

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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 due to properly reported illness are excused, 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.*, 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*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

When considering whether a claimant should be disqualified from benefits for misconduct, the focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). In this case, the claimant’s final absence was due to a suspected glitch or misunderstanding within the employer’s vacation entering system. He made a good faith effort to request the time off and believed it had been granted. When the claimant notified his manager of the issue, he was told it would be fixed but instead he was discharged. This final incident appears to be not purposeful on the claimant’s behalf but rather due to misunderstanding or miscommunication.

Further the evidence does not support that the claimant was sufficiently warned to know his job was in jeopardy prior to June 10, 2019. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Based on the credible evidence presented, the administrative law judge concludes the employer has failed to establish by a preponderance of the evidence that the claimant's discharge constitutes disqualifying job-related misconduct.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The July 12, 2019 (reference 01) initial decision is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn