IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARY H KING Claimant **WALMART INC** Employer	**APPEAL 21A-UI-09519-ML-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/14/21** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 31, 2021 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on June 16, 2021. The claimant, Mary King, participated personally. The employer, Walmart, Inc., participated through manager Crystal Moore.

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 an overnight stocking team associate. Claimant was employed from May 29, 2013, until March 13, 2021, when she was discharged from employment for excessive unexcused absenteeism. Claimant's immediate supervisor was Crystal Moore.

Ms. King was discharged from Wal-Mart, Inc. on March 13, 2021, after she exceeded the permissible number of attendance infractions allowed under the company's attendance policy. Under the terms of the policy, employees are subject to discharge if they accumulate five attendance infractions within a six-month rolling period. Claimant was aware of the employer's attendance policy. Claimant was aware she had been accumulating points throughout 2021. She was also aware that she could lose her job if she accumulated five or more points.

Wal-Mart uses a third-party leave and disability administrator, Sedgwick. At times during her employment, Sedgwick approved Ms. King for continuous leave under the Family Medical Leave Act (FMLA). According to Ms. Moore, claimant had been approved for continuous leave through November 2021. Claimant testified that she had applied for intermittent FMLA leave, but her application was denied by Sedgwick. It appears claimant was only eligible to take continuous FMLA leave.

Little is actually known about the details of claimant's FMLA leave. Claimant could not remember when she applied for or received FMLA leave, and Ms. Moore had not seen any documents relating to claimant's FMLA leave, as the FMLA leave was established before claimant transferred into Ms. Moore's department.

Claimant was to report her absences to both Sedgwick and Wal-Mart. According to the attendance and punctuality policy, absences related to FMLA leave had to be reported to Sedgwick within two calendar days of the absence. Failure to report the absence to Sedgwick in a timely manner would result in the leave being denied. Once Sedgwick had notice of an absence, Sedgwick would send an e-mail notification regarding the same to Wal-Mart's human resources department, Wal-Mart management, and the necessary department managers.

In the six-month time period leading up to her termination date, claimant accumulated 8.5 attendance points for absences that were not covered under her intermittent FMLA plan. The first two absences that counted against her came on January 11, 2021, and January 12, 2021. Claimant asserts these first two absences were related to dental work that she properly reported to the human resources department. Ms. Moore testified that claimant was approved for time off between December 22, 2020, and January 10, 2021. Claimant believed that she had taken work off during this time period to care for her daughter. In February, she was absent without approval on February 1, 2021, February 3, 2021, February 16, 2021, February 21, 2021, and February 24, 2021. Claimant did not know why she was absent throughout February, 2021; however, she believed that some of her absences were likely related to caring for her daughter. In March, she was absent without approval on March 7, 2021. Claimant accumulated half of a point on March 9, 2021, when she left her shift early. Ms. Moore did not work on March 9, 2021, and was unaware as to why claimant had to leave early. The on-duty manager for March 9, 2021, did not tell Ms. Moore whether or not claimant had provided a reason for leaving early.

All doctor's notes and medical excuses are to be provided to Wal-Mart's human resources department. Ms. Moore was unaware as to whether the human resources department had received any medical excuses from claimant. Ms. Moore could only testify that she, herself, had not received any medical excuses from claimant.

On March 1, 2021, Ms. Moore approached claimant about her recent string of absences. Claimant told Ms. Moore that she believed her absences were covered under her intermittent or continuous leave policy. Ms. Moore informed claimant that she had not received confirmation from Sedgwick for the previously discussed absences. Ms. Moore then gave claimant approximately 10 days to obtain confirmation numbers from Sedgwick for the dates in question. Ms. Moore further told the claimant that she could also ask Sedgwick to call her with the confirmation numbers or to confirm that claimant reported absences on the dates in question. Ms. Moore followed up with claimant on March 10, 2021. Claimant did not provide confirmation numbers to Ms. Moore. Claimant testified she provided confirmation numbers to the human resources department on at least three occasions.

At hearing, Ms. Moore testified that she had a total of six employees that had been approved for intermittent or continuous FMLA leave. Ms. Moore further testified that she was regularly receiving FMLA e-mails from Sedgwick regarding four of the six employees. She was not receiving FMLA e-mails from Sedgwick for claimant and her daughter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged 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(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).

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the 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.

871 IAC 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 of proof in establishing disqualifying job misconduct. Iowa Code § 96.6(2); *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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

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, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." Higgins, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but

not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Furthermore, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. With the above factors in mind, the administrative law judge finds claimant to be a credible witness. The undersigned has no reason to question the credibility of claimant's statements. As will be discussed in greater detail below, the undersigned does not specifically reject the testimony of Ms. Moore. Ms. Moore presented as a credible witness; however, she lacked the firsthand knowledge necessary to carry the employer's burden of proof.

Here, claimant had 8.5 absences above what was approved by her employer in a six-month time period. Claimant applied for, but did not receive, intermittent FMLA leave. She was, however, eligible for continuous FMLA leave through November, 2021. Claimant credibly testified that she properly reported each of her absences to both Sedgwick and the employer. She further testified that she provided medical excuses or doctor's notes to Wal-Mart's human resources department when necessary. Lastly, claimant testified that she provided confirmation numbers for her absences to the human resources department on at least three occasions. It appears claimant largely dealt with the human resources department with regards to her absences.

The most effective means to participate in an unemployment appeal hearing is to provide live testimony from a witness with firsthand knowledge of the events leading to the separation. While it is clear Ms. Moore was generally aware of the circumstances surrounding claimant's separation from employment, she lacked firsthand knowledge of claimant's interactions with Sedgwick and the human resources department. As previously discussed, Ms. Moore had not seen any documents relating to claimant's FMLA leave, as the FMLA leave was established before claimant transferred into Ms. Moore's department. Moreover, Ms. Moore was unaware as to whether the human resources department had received any medical excuses from claimant for her absences. Ms. Moore could only testify that she, herself, had not received any medical excuses from claimant. The employer failed to rebut claimant's assertion that her absences were properly reported, medical absences.

The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify her from receiving benefits. Benefits are allowed.

DECISION:

The March 31, 2021 (reference 01) unemployment insurance decision is REVERSED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Michael J. Lunn
Administrative Law Judge
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July 12, 2021
Decision Dated and Mailed

mjl/kmj