IOWA DEPARTMENT OF INSPECTIOSN AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

JEFFREY TUTTLE Claimant **WALMART INC.** Employer	**APPEAL 22A-UI-14375-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/22/22** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

Walmart Inc, the employer/appellant, filed an appeal from the Iowa Workforce Development's (IWD) June 14, 2022 (reference 01) unemployment insurance (UI) decision that allowed REGULAR (state) UI benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 4, 2022. The employer participated through Daniel Charlier, digital coach, and Marlene Sartin, hearing representative from Equifax Workforce Solutions. Mr. Tuttle did not participate in the hearing. The administrative law judge took official notice of the administrative record, including the fact-finding file.

ISSUE:

Did the employer discharge Mr. Tuttle from employment for disqualifying job-related misconduct?
Was Mr. Tuttle overpaid benefits?
If so, should he repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Tuttle began working for the employer on January 16, 2020. He worked as a full-time online grocery associate. His employment ended on May 25, 2022.

The employer's policy provides that employees must either call-in or use the employer's online form to report absences or instances of tardiness. Employees accrue points as follows for absences and instances of tardiness: one-half point for clocking in more than ten minutes late, or leaving more than ten minutes early, and one point for clocking in more than three hours late or not attending work for an entire shift. Employees who accrue five or more total points are subject to termination of employment. Employees also accrue protected paid-time-off (PTO), which employees may use to cover instances of tardiness or absences. Mr. Tuttle accrued

fifteen minutes of protected PTO for each eight-hour shift he worked. Mr. Tuttle received a copy of the employer's policy on, or around, his hire date.

Mr. Charlier's practice was to issue a verbal warning to employees who had accrued three points. The employer gave Mr. Tuttle verbal warnings on March 6, 2021, and August 11, 2021 and a final verbal warning on September 21, 2021 for attendance issues. Mr. Tuttle's attendance improved after September 2021.

Mr. Tuttle was absent one day in February 2022, two days in March 2022, and he left early on May 18, 2022. Mr. Tuttle had enough accrued protected PTO to cover those absences/early out. As of May 18, Mr. Tuttle had accrued 4.5 points.

Mr. Tuttle called in sick on May 19. Mr. Charlier initially testified that Mr. Tuttle did not give a reason for his absence that day. During the fact-finding process, the employer had reported in its written questionnaire that Mr. Tuttle had called in sick on May 19. In response to the administrative law judge pointing out the inconsistency between what Mr. Charlier had testified to and what the employer had reported during the fact-finding process, Mr. Charlier testified that Mr. Tuttle had, in fact, called in sick on May 19.

Mr. Tuttle returned to work after his May 19 absence. Mr. Tuttle did not have enough protected PTO to cover the one point he accrued on May 19, so the employer terminated his employment on May 25 for accruing more than five points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Mr. Tuttle from employment for no disqualifying reason.

On June 16, 2022, Governor Reynolds signed into law House File 2355, which among other things, amended Iowa Code 96.5(2) to redefine misconduct and to list specific acts that constitute misconduct. The bill did not include an effective date and so it took effect on July 1, 2022. *See* Iowa Const. art. III, § 26; Iowa Code § 3.7(1).

There is a strong presumption in U.S. jurisprudence against legislation being applied retroactively. "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). This is in part because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly...." *Landgraf v. USI Film Prod.,* 511 U.S. 244, 265 (1994).

It would be fundamentally unfair and inconsistent with widely accepted legal principles to apply the amended Iowa Code 96.5(2) to the conduct at issue in this matter, which occurred before HF 2355 went into effect on July 1, 2022. As such, the amended Iowa Code 96.5(2) effective July 1, 2022 should not be applied to the conduct at issue here, and instead Iowa Code 96.5(2) as it existed at the time of the conduct will be applied.

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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

> (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.
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> (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.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

The employer has the burden of proof in establishing disqualifying job misconduct. *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 the claimant from employment, 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Excessive absenteeism is not considered misconduct unless unexcused. 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. The requirements for a finding of misconduct based on absences are 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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*, 321 N.W.2d at 9; *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. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The most recent incident leading to Mr. Tuttle's discharge must be a current act of misconduct to disqualify him from receiving benefits. In this case, the most recent act for which Mr. Tuttle was discharged was for calling in sick on May 19, 2022. Mr. Tuttle's May 19 absence was for a reasonable ground – illness – and he properly reported the absence to the employer. Mr. Tuttle's May 19 absence is excused and is not misconduct. The employer has failed to establish disqualifying job-related misconduct. Benefits are allowed.

Since Mr. Tuttle is eligible for UI benefits, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The June 14, 2022 (reference 01) UI decision is AFFIRMED. The employer discharged Mr. Tuttle from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Daniel Zeno
Administrative Law Judge

September 28, 2022
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf or by contacting the District Court Clerk of Court https:///www.iowacourts.gov/iowa-courts/court-directory/.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrit**o dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf o comunicándose con el Tribunal de Distrito Secretario del tribunal https:///www.iowacourts.gov/iowa-courts/court-directory/.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.