

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GREGORY L DAVIS
Claimant

WALMART INC
Employer

APPEAL 19A-UI-04142-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/21/19
Claimant: Respondent (1)

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

On May 20, 2019, the employer filed an appeal from the May 8, 2019, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged for absenteeism and his absences were excused and properly reported. The parties were properly notified of the hearing. A telephonic hearing was held on June 14, 2019. The claimant, Gregory L. Davis, participated. The employer, WalMart, Inc., participated through Jon Lempianen, Store Manager; Ivar Vantol, Personnel Coordinator; and Amber Holmes, Auto Care Center Assistant Manager. Employer's Exhibits 1 through 15 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

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, most recently as the automotive care center shop supervisor, from June 5, 2013, until January 25, 2019, when he was discharged due to absenteeism.

Claimant's final absence occurred on January 25, 2019. Claimant explained that he had a cancerous cyst removed and was taking chemotherapy treatments that made him ill. Claimant called into the automated attendance line to report this absence. Claimant selected the option to report that this absence was related to personal illness.

Claimant applied for intermittent leave of absence with the employer's third-party administrator. This leave of absence was denied on January 3, 2019. (Exhibit 4) That same day, Holmes had a conversation with claimant about his attendance. Holmes told claimant that he was at eight points and was at immediate risk of discharge. Claimant explained that he was having difficulty with the intermittent leave of absence application, as he had just recently obtained health insurance and did not yet have a primary healthcare provider. Holmes talked to claimant about contacting the third-party administrator for an extension in which to submit the medical paperwork necessary for his leave application.

Claimant had six prior absences during the second half of 2018. Each of these absences was due to illness, and each of these absences was properly reported to the employer. Claimant also left early on two occasions.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,968.00, since filing a claim with an effective date of April 21, 2019, for the eight weeks ending June 8, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal. Both Lempianen and Holmes participated on behalf of the employer.

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, provided he is otherwise eligible.

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 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).

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); *Cosper*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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 employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The employer argues that claimant should have followed the process to obtain an approved intermittent leave of absence. FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee. In spite of employer's decision to require an approved FMLA leave of absence, claimant's absence was excused. The administrative law judge finds claimant's last absence was related to properly reported illness or other reasonable grounds. Therefore, the employer has not established a final or current incident of unexcused absenteeism. Since the employer has not established a current or final act of misconduct, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As claimant's separation is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The May 8, 2019, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn