

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CARMEN BELLO
Claimant

WALMART INC.
Employer

APPEAL 21A-UI-19777-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/06/21
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Carmen Bello, filed an appeal from the August 31, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged due to a known rule. The parties were properly notified of the hearing. A telephone hearing was held on October 28, 2021. The claimant participated and testified. The employer did not participate. No exhibits were received into the record. Spanish interpretation services were provided to the claimant.

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 worked as a full-time cashier from August 31, 2016, until the date she was discharged on June 8, 2021. The claimant's immediate supervisor was Store Teresa Benner.

The employer has an attendance policy. The attendance policy requires employees to call in through an application. The attendance policy states that if an employee misses five shifts, then they are immediately terminated. Employees can review employee handbook provisions on the employer's Intranet service.

On April 7, 2021, the claimant was coughing at work. The claimant thought she had a Covid19 infection. The claimant informed Supervisor Gary (last name unknown) and he sent her home that day to be tested. The claimant received a negative test result. The claimant called in for several shifts later that month because she was still experiencing symptoms.

On June 7, 2021, the claimant was assigned to the self-checkout area of the store. She had not been trained to perform this task yet. The claimant was not sure how to fix errors if the customer scanned the wrong item or scanned it twice. It takes roughly 45 minutes from a

supervisor to respond if something like this comes up, so the claimant wanted to be prepared to fix it on her own. With these concerns in mind, the claimant went to the back of the store. The claimant told Gary (last name unknown) her concerns and asked to be placed on a regular register. Gary (last name unknown) refused to acknowledge these concerns and directed the claimant to go back to the self-checkout area. An argument ensued. Gary (last name unknown) started yelling at her. The claimant expressed her grievances regarding perceived favoritism and asked Gary (last name unknown) to stop yelling at her. Eventually, the claimant said, "Fuck this" under her breath. There were other staff in the area, but they had headphones in, so the claimant does not believe they heard the statement. Ms. Benner sent the claimant home that day.

On June 8, 2021, Ms. Benner terminated the claimant. Ms. Benner gave two rationales. First, the claimant had exceeded the amount of attendance points (16) she was given under the employer's policy. Second, Ms. Benner said she was terminating the claimant for the argument she had the previous day with Gary. The claimant believes the attendance points were accrued when she was ill in April, although some instances could have occurred in May or June.

The claimant had not been disciplined for swearing or attendance in the past.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct.

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).

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.

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*, 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. 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 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 related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

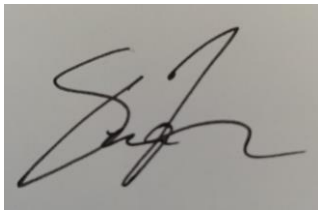
Iowa Admin. Code r. 871-24.32(4) provides:

(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.

In this case, the employer has failed to meet its burden to show the claimant engaged in willful or deliberate misconduct. The record shows the claimant was terminated for two separate categories of conduct and as a result it has failed to provide a specified reason regarding her discharged under Iowa Admin. Code r. 871-24.32(4). Regarding the attendance reason, the record does not establish the claimant's absences can constitute misconduct under Iowa Admin. Code r. 871-24.32(7) because they were properly reported and excused by illness. Benefits are granted.

DECISION:

The August 31, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to non-disqualifying conduct. Benefits are granted provided she is otherwise eligible.



Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

December 6, 2021
Decision Dated and Mailed

smn/mh