

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RUSTY D. HARPER
Claimant

WALMART INC.
Employer

**DIA APPEAL NO. 22IWDUI0003
APPEAL 21R-UI-14021**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/03/21
Claimant: APPELLANT (2R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The Claimant/Appellant, Rusty D. Harper, filed an appeal from the February 16, 2021, unemployment insurance decision (reference 01) that concluded Appellant was not eligible for unemployment insurance benefits. On April 2, 2021, a Notice of Hearing was mailed to the Appellant's last known address of record for a telephone hearing scheduled for April 19, 2021. However, there was typographical error (the street address was listed as "100" instead of "1000"). A telephone hearing was held and Appellant did not appear, thus a default decision was entered on April 20, 2021, for *Harper v. Walmart, Inc.*, DIA No. 21IWDUI2047 (IWD Appeal No. 21A-UI-06235). Claimant Harper submitted an appeal to the Iowa Employment Appeal Board on or about April 29, 2021. Claimant explained he did not receive the Notice of Hearing. The Employment Appeal Board remanded the matter for hearing on June 14, 2021. A new Notice of Hearing was issued scheduling the telephone hearing for August 6, 2021, at 10:30 a.m., by telephone. The Appellant/Claimant, Rusty D. Harper, participated personally. The employer, Walmart Inc., did not appear nor participate. The administrative law judge took official notice of the claimant's unemployment insurance records. No other exhibits were offered.

ISSUES:

Was the Claimant discharged for disqualifying job-related misconduct, i.e. excessive unexcused absenteeism after warning?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a stocker in the dairy and dry grocery areas at Walmart since October of 2019. His job duties included working from approximately 4:00 a.m. until 1:00 p.m., Tuesday through Saturday of the workweek. Claimant's immediate supervisor varied – it was the scheduled assistant manager for any given workday.

On December 28 or 29, 2020, Appellant last worked for Walmart. He called the next day and Walmart had implemented an automated phone health assessment whereby workers called in and completed the automated process. Claimant indicated he was not feeling well and had a temperature. Walmart's automated assessment program instructed him to not come in to work, but to call Sedgwick, a third-party administrator for Walmart's sick leave and attendance issues. Sedgwick apparently contacted Walmart's Human Resources Department and obtained a confirmation number for his case. Claimant then went to a doctor and a COVID-19 test was conducted. The results were due sometime in the next three to four days.

On January 2, 2021, Appellant tried to look at his paycheck and to see find out his work schedule for the next work period. He was unable to do so. He attempted to call Sedgwick and Walmart Human Resources to figure out what was going on. Unable to get through, he called an assistant manager named "Brandon" (last name unknown). Claimant was informed he was terminated on or after January 1, 2021.

It is unknown what the Walmart employer policy regarding absenteeism was at the time. A representative for Walmart failed to appear at the hearing and no exhibits were entered into the record. Claimant testified any of his work absences during the employment relationship were supported by a doctor's note. Claimant testified he was never disciplined for anything, including absences.

Claimant received a negative test result on or about January 4, 2021. He was ready to resume working either after receiving a negative test result or after waiting until January 10, 2021, if the test was positive, based on his doctor's instructions. He could have returned to work earlier because of the negative test result.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the Claimant was discharged from employment 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).

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.

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(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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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.*


Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). 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. Further, 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).

In this case the Claimant properly reported his absence due to illness. This is not an excessive or unreasonable amount of absences in a pandemic when the employer requires a self-assessment, reporting to the sick leave entity, and follows physician instructions. No other unexcused absence is reflected in the record.

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

DECISION:

The February 16, 2021, (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged 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.



Forrest Guddall
Administrative Law Judge
Iowa Department of Inspection and Appeals
Wallace State Office Building, Third Floor
Des Moines, IA 50319

August 9, 2020

Decision Dated and Mailed

FG/lb

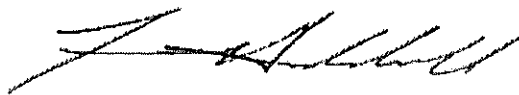
CC: Rusty D. Harper, Claimant (by first class mail)
Walmart Inc., Employer (by first class mail)
Nicole Merrill, IWD (email)
Joni Benson, IWD (email)

Case Title: HARPER V. WALMART INC

Case Number: 22IWDUI0003

Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Forrest Guddall', written in a cursive style.

Forrest Guddall, Administrative Law Judge