

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**BRANDON A. WOLKEN
203 W. SOUTH ST.
MARSHALLTOWN, IA 50158-3254**

**WALMART INC.
C/O WANDA GIBBS
2802 S. CENTER ST.
MARSHALLTOWN, IA 50158**

**DIA APPEAL NO. 21IWDUI2086
IWD APPEAL NO. 21A-UI-07639**

**ADMINISTRATIVE LAW JUDGE
DECISION**

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the mailing date below the administrative law judge's signature on the last page of the decision, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

***Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
or
Fax (515) 281-7191***

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:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your 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.

ONLINE RESOURCES:

UI law and administrative rules: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-law-and-administrative-rules>

UI Benefits Handbook: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-handbook-guide-unemployment-insurance-benefits>

Handbook for Employers and forms: <https://www.iowaworkforcedevelopment.gov/employerforms>

Employer account access and information: <https://www.myiowaui.org/UITIPTaxWeb/>

National Career Readiness Certificate and Skilled Iowa Initiative: <http://skillediowa.org/>

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRANDON A. WOLKEN
Claimant

WALMART INC.
Employer

**DIA APPEAL NO. 21IWDUI2086
IWD APPEAL NO. 21A-UI-07639**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/24/21
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 12, 2021 (reference 01) unemployment insurance decision that denied benefits based upon his separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on May 6, 2021. The claimant, Brandon Wolken, participated and presented testimony. The employer, Walmart Inc., participated through ACCM Manager Wanda Gibbs. Official Notice was taken of the administrative file, which included the notice of telephone hearing, the transmittal form transmitting this case to DIA, the decision at issue herein, and the appeal request.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
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 began working for Walmart, Inc. on September 11, 2018. During the course of his employment he applied for and received two extra days per month of FMLA leave in addition to the five absences he was allowed in a rolling six month period, per the employer's policies. Wolken had intermittent leave due to ongoing mental health issues. Wolken was having a rough time with his mental health and was changing medications. He was also attempting to reapply for additional intermittent leave during the month of December, 2021 for his health issues.

In November, 2020, December, 2020, and January, 2021, Wolken was approved for seven absences per month. He was excused for eight missed days in November of 2020. Wolken was also excused for seven absences in December of 2020, including December 1, 3, 6, 8, 11, 13 and 30. In January of 2021, he was approved for seven absences on January 3, 5, 6, 7, 10, 17 and 19.

Wolken had thirteen absences in a six month period that were not covered by his allowed five rolling days and his FMLA leave. The first absence that counted against him was on November

23, 2020. In December, he was absent without approval on December 10, 2020, December 15, 2020 and December 17, 2020. In January, he was absent without approval on January 12, 2021, January 14, 2021, January 20, 2021, January 21, 2021, January 22, 2021, January 23, 2021, January 25, 2021, January 26, 2021 and January 27, 2021.

Wolken was aware of the attendance policy. The policy includes termination of employees after five absences. Wolken called in every day he was absent to report that he would not be coming in to work as he was required to by Reed Group, the company that handles the FMLA claims for the employer.

Wolken was in the process of attempting to get medical documentation to Reed Group from his doctor's office to be approved for additional leave in December of 2020. His doctor's office told Wolken they never received the fax from Reed Group requesting the information, and Reed Group kept claiming they sent it. Ultimately, additional leave was denied on December 15, 2020.

Walmart Claims Management Services sent Claimant a letter on January 26, 2021, instructing him regarding his most recent request for accommodation and the alternative accommodation he was being offered. It was not a termination letter. The letter indicated his specific request for intermittent leave of absence could not be approved. It informed him that he could alter his availability but he could not be guaranteed a preferred schedule and it could result in a reduction of hours. The letter informed Wolken that he was required to recertify his request by July 26, 2021.

Three days later, on January 29, 2021, Wolken's manager, Jennifer McMullin, called Claimant and informed him over the phone that he was let go due to attendance. She talked to him for a lengthy amount of time, saying she was sorry she had to let him go. She talked to him about his absences being a problem and they discussed the Reed Group situation and how he was trying to get his doctor and Reed Group to help out and get the paperwork through. McMullin advised Wolken to apply for unemployment. Wolken testified at hearing that there was no way he would quit his job. He called in every day per policy.

There is no indication that Jennifer McMullin gave Wolken a verbal warning prior to termination, or that she let him know he was getting close to that point with his absences. Wanda Gibbs testified that this is something she would do once an associate was getting close to that point. In addition, Gibbs stated that once an associate exceeds allowable absences, they would be called into the office. If the associate did not agree with termination, they have a right to talk to upper management. She agreed that this course of action was not taken by McMullin with Claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows: There is no evidence that Wolken voluntarily quit his employment. Wolken was terminated from his employment due to excessive absenteeism. The question is whether this constitutes misconduct warranting a denial of unemployment benefits.

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.

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 are not considered excused. *Id.* at 191. Excessive absenteeism has been found when there have 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); *Armstrong 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. 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).

Here, it is undisputed that in a three-month period, Claimant had 13 absences above what was approved by his employer. Wolken had been covered by FMLA for additional absences due to intermittent leave for mental health reasons. He was attempting to reapply for intermittent leave in December, which he was unable to do due to a lack of communication between his doctor’s office and Reed Group. Of additional note, Wolken undisputedly called in and reported every absence, informing his employer his absences were due to medical reasons. The undersigned administrative law judge concludes that Claimant’s absences were due to medical reasons and were reported to his employer and therefore do not constitute disqualifying misconduct due to excessive absenteeism. For these reasons, the undersigned concludes that Claimant’s request for benefits must be approved.

DECISION:

The March 12, 2021 (reference 01) unemployment insurance decision is reversed.



Tricia A. Johnston
Administrative Law Judge

May 11, 2021
Decision Dated and Mailed

TAJ/

CC: Brandon Wolken (by First Class Mail)
Walmart Inc. (by First Class Mail)
Nicole Merrill, IWD (By Email)
Joni Benson, IWD (By Email)