

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

DARLENE M VANBALEN
Claimant

APPEAL NO. 11A-UI-05128-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 02/13/11
Claimant: Respondent (2-R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 7, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on May 12, 2011. Claimant participated. Employer participated through Store Manager Ryan Oshel.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits and whether she is overpaid benefits as a result.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a vision center associate from June 18, 2008 and was separated from employment on February 23, 2011. The leave of absence paperwork for a series of absences was sent to her on December 3, 2010. She did not provide documentation to support a leave of absence for the period from December 17 through 28, 2010. Her leave of absence was supported by medical documentation for the period from December 28, 2010 through February 4, 2011. She saw a surgeon, Dr. Richardson, on December 17 about her strep throat and related medical issues and had surgery (tonsillectomy) on December 28, 2010. She did not see her family physician about the strep throat or tonsillectomy. She was not scheduled to work between February 4 and 14, 2011. She reported to work and was called into an attendance meeting on February 14 when the employer told her that she would be suspended until she provided medical documentation in support of the two-week absence ending December 28, 2010 and gave her a deadline of February 18. She contacted the surgeon and on February 16, 2011 obtained a diagnostic report dated December 17, 2010 but failed to provide the information or otherwise communicate with the employer thereafter. She did not attempt to seek clarification from the employer about whether the diagnostic report would suffice in support of the absence period.

The claimant has received unemployment benefits after the separation on a claim with an effective date of February 13, 2011.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

871 IAC 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 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness or injury cannot constitute job misconduct, since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that she must provide documentation in support of her absence from December 17 through 28, 2010 and failed to do so. The employer's request was reasonable. Since the claimant failed to provide the diagnostic report dated December 17, 2010 to the employer in an attempt to determine if that would satisfy the employer's request, the separation was because of excessive, unexcused absenteeism for that period. Benefits are withheld.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be

credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The April 7, 2011 (reference 01) decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw