

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KELLY CUNNINGHAM**  
Claimant

**APPEAL NO: 09A-UI-03453-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 02-01-09**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the February 24, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 30, 2009. The claimant participated in the hearing. Kenneth Heili, Assistant Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time sales associate for Wal-Mart from August 4, 2004 to January 30, 2009. She was discharged for exceeding the allowed number of attendance points. The employer could not provide the dates of her absences prior to January 25, 2009, or the dates she received a verbal warning, written warning or decision-making day. The claimant's son suffers from asthma and has been hospitalized several times. The claimant's attendance points were accumulated due to his illness or her own. She submitted FMLA paperwork to her physician but it was apparently placed in the wrong file and despite the fact she called her doctor's office every week to check on the paperwork she did not receive it until the day of her termination. On January 25 and 26, 2009, the claimant was absent due to her son's illness and properly reported her absences. On January 29, 2009, the claimant had food poisoning and was unable to call the employer until four hours after the start time of her shift because she was vomiting constantly. The employer terminated her employment January 30, 2009, for violating its attendance policy.

**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.

Iowa Code section 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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant may have violated the employer's attendance policy, the employer could not provide any dates of her absences or warnings or the reasons for those absences. The claimant credibly testified her absences were due to the illness of her son or herself and she was trying to obtain the necessary FMLA paperwork to cover her absences. Additionally, she was told not to bring doctor's excuses because "it would not do any good." Although the claimant was late in reporting her last absence, her tardiness in calling was due to the fact she was too ill to make the call until four hours after the start of her shift and she reported it as soon as possible. Because the final absence was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed. Benefits are allowed.

#### **DECISION:**

The February 24, 2009, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css