

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

LATRICIA L TURNER-BERT
Claimant

WALMART INC.
Employer

APPEAL 23A-UI-03070-DZ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/19/23
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

Walmart Inc., the employer/appellant,¹ filed an appeal from the Iowa Workforce Development (IWD) March 13, 2023 (reference 01) unemployment insurance (UI) decision. The decision allowed Ms. Turner-Berg REGULAR (state) UI benefits because IWD concluded the employer dismissed her from work on February 23, 2023 for excessive absences but Ms. Turner-Berg's absences were for illness and she properly the absences to the employer. The Iowa Department of Inspections and Appeals UI Appeals Bureau mailed notices of hearing to the employer and Ms. Turner-Berg. The undersigned administrative law judge held a telephone hearing on April 7, 2023. The employer participated through Heather McComb, coach. Ms. Turner-Berg did not participate in the hearing. The undersigned took official notice of the administrative record and admitted Employer's Exhibit 1 as evidence.

ISSUE:

Did the employer discharge Ms. Turner-Berg from employment for disqualifying job-related misconduct?

Did IWD overpay Ms. Turner-Berg UI benefits?

If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Turner-Berg began working for the employer on January 18, 2022. She worked as a full-time overnight stocker. Her employment ended on February 23, 2023.

The employer uses an attendance point system. Employees who accrue more than five points in a rolling six-month period are subject to termination of employment. During the week of February 12-18, 2023 the employer talked with Ms. Turner-Berg about attendance issues. The employer told Ms. Turner-Berg that if she called in again, the employer could end her employment.

¹ Appellant is the person or employer who filed the appeal.

Ms. Turner-Berg called in on Monday, February 20 and Tuesday, February 21 because she was sick. The employer gave Ms. Turner-Berg points for these absences, so Ms. Turner-Berg had 5.5 points at this time. On Thursday, February 23 the employer terminated Ms. Turner-Berg's employment because she had more than 5 points in a rolling six-month period.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes the employer discharged Ms. Turner-Berg from employment for a reason that does not disqualify her from receiving UI benefits..

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of such the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(9) Excessive unexcused tardiness or absenteeism.

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

(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.** [Emphasis added.]

(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.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

Excessive absenteeism is not considered misconduct unless the excessive absences are also unexcused. 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. The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive.² The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings.³ Second, the absences must be unexcused.⁴ The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” or because it was not “properly reported.”⁵

An employer’s no-fault absenteeism policy or point system does not, on its own, decide the issue of qualification for UI benefits. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not voluntary. This is true 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.⁶ Medical documentation is not essential to a determination that an absence due to illness should be treated as excused.⁷ Absences related to other issues such as transportation, lack of childcare, and oversleeping are not considered excused.⁸ When a claimant does not provide an excuse for an absence the absences is deemed unexcused.⁹

The employer has the burden of proof in establishing disqualifying job misconduct.¹⁰ The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.¹¹ Misconduct must be “substantial” to warrant a denial of job insurance benefits.¹²

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation of the employer’s policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, Ms. Turner-Berg’s February 20 and 21 absences were all for good cause – illness – and she properly reported these absences to the employer. Both of these absences are excused and are not misconduct, per Iowa law.

Furthermore, the most recent incident leading to Ms. Turner-Berg’s discharge must be a current act of misconduct to disqualify her from receiving UI benefits. The most recent act for which the

² Sallis v. Emp’t Appeal Bd., 437 N.W.2d 895 (Iowa 1989).

³ Higgins v. Iowa Dep’t of Job Serv., 350 N.W.2d 187, 192 (Iowa 1984).

⁴ Cosper v. Iowa Dep’t of Job Serv., 321 N.W.2d 6, 10 (Iowa 1982).

⁵ Higgins, 350 N.W.2d at 191; Cosper, 321 N.W.2d at 10.

⁶ Iowa Admin. Code r. 871-24.32(7); Cosper, 321 N.W.2d at 9; Gaborit v. Emp’t Appeal Bd., 734 N.W.2d 554 (Iowa Ct. App. 2007).

⁷ See Gaborit, 734 N.W.2d at 555-558.

⁸ Higgins, 350 N.W.2d at 191.

⁹ Id.; see also Spragg v. Becker-Underwood, Inc., 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

¹⁰ Cosper v. Iowa Dep’t of Job Serv., 321 N.W.2d 6 (Iowa 1982).

¹¹ Infante v. Iowa Dep’t of Job Serv., 364 N.W.2d 262 (Iowa Ct. App. 1984).

¹² Newman v. Iowa Dep’t of Job Serv., 351 N.W.2d 806 (Iowa Ct. App. 1984).

employer terminated Ms. Turner-Berg's employment was because of her February 20 and 21 absences. The employer has failed to establish misconduct on the part of Ms. Turner-Berg. Benefits are allowed.

Since Ms. Turner-Berg is eligible for REGULAR (state) UI benefits per this decision, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.¹³

DECISION:

The March 13, 2023, (reference 01) UI decision is AFFIRMED. The employer discharged Ms. Turner-Berg from employment for a reason that does not disqualify her from receiving UI benefits. Benefits are allowed, as long as no other decision denies Ms. Turner-Berg UI benefits. Any benefits claimed and withheld on this basis shall be paid.



Daniel Zeno
Administrative Law Judge

April 10, 2023
Decision Dated and Mailed

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¹³ *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly 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.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrito** dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.