

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIANNA ARENADO
Claimant

WALMART ASSOCIATES
Employer

APPEAL 22A-UI-06537-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/30/22
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Admin. Code r. 871-24.32(7) – Discharge / Absenteeism
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On March 11, 2022, claimant Brianna Arenado filed an appeal from the March 1, 2022 (reference 03) unemployment insurance decision that denied benefits based on a determination that claimant was discharged from work due to violation of a known company rule. The parties were properly notified of the hearing. A telephonic hearing was held at 9:00 a.m. on Friday, April 22, 2022. The claimant, Brianna Arenado, participated. Witness Victoria Cole, representative payee for Brianna Arenado, also participated in the hearing. Employer Walmart Associates did not appear or participate in the hearing. No exhibits were offered or admitted into the record.

ISSUE:

Was the claimant discharged from employment for any disqualifying reason?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for Walmart at its Blairs Ferry Road location in Cedar Rapids on October 1, 2021. She was employed as a full-time online order-picker. Claimant's employment ended on January 31, 2022, when she was discharged due to absenteeism.

Claimant had missed January 28, January 29, and January 30, all due to personal illness. She reported each of these absences through the employer's online reporting system. Additionally, claimant applied for a leave of absence on Friday, January 28, to cover the absences. When she returned to work on January 31, department head Tim informed her that she was terminated. While he did not count her most recent absence as a "point," he said some of her older absences were not excused and counted as "points," even though HR management had excused them. Claimant recalls missing work in the past due to COVID-19 and other personal illness.

Claimant did not receive a copy of the attendance policy when she was hired. She said the employer just told her not to miss work. The employer did not give her information on how to report her absences. However, she knew how to report absences because she had worked for the employer at a different location previously. She followed what she believed the employer's policies were to the best of her ability.

Claimant began an active and earnest search for work after she separated from employment. She has reliable transportation to and from work, and she made at least four employment contacts each week that she filed for unemployment insurance benefits. Claimant obtained employment and is now working.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is eligible for unemployment insurance 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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 6; *Gaborit v. Emp't Appeal Bd.*, 734 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. *Gaborit*, 734 N.W.2d at 554. 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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant's final absences was related to properly reported illness. Therefore, no final or current incident of unexcused absenteeism occurred that would establish work-connected misconduct. Since the employer has not established a current or final act of misconduct, the history of other absences will not be examined. Accordingly, benefits are allowed.

The next issue is whether claimant is able to and available for work. Iowa Code § 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

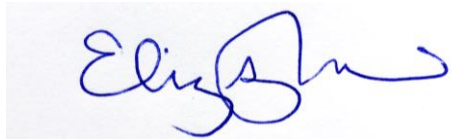
(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean

that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

For an unemployed individual to be eligible to receive benefits, she must be able to work, available for work, and actively seeking work as required by the unemployment insurance law. Iowa Code § 96.4(3). The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. Iowa Code § 96.6(2); Iowa Admin. Code r. 871-24.22. In this case, claimant established through credible testimony that she was physically able to work and available to accept employment. She made an active and earnest search for work throughout her weeks of unemployment. Accordingly, benefits are allowed.

DECISION:

The March 1, 2022 (reference 03) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. She is able to work and available for work. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis must be paid.



Elizabeth A. Johnson
Administrative Law Judge
Unemployment Insurance Appeals Bureau

April 26, 2022
Decision Dated and Mailed

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