

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SUSAN JAYNES
Claimant

WALMART INC
Employer

APPEAL 21A-UI-19432-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/25/21
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer, Walmart Inc., filed an appeal from the August 23, 2021, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion the claimant was terminated for absences excused due to illness. The parties were properly notified of the hearing. A telephone hearing was held on October 25, 2021. The claimant did not participate. The employer participated through Assistant Store Manager Brandon Rice. Official notice was taken of the agency records. Exhibits 1, 2, 3 were received into the record.

ISSUES:

Whether the claimant's separation is disqualifying?
Whether the claimant has been overpaid benefits? Whether the claimant is excused from repaying those benefits due to the employer's inadequate participation at fact finding?
Whether the claimant has been overpaid Federal Pandemic Unemployment Compensation benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed part-time as a member frontline associate from September 22, 2020, until this employment ended on April 22, 2021, when she was discharged. The claimant's immediate supervisor was Assistant Store Front End Manager Amber Steth.

The employer has an attendance policy. The attendance policy states that employees are to inform the employer of an anticipated absence by calling the Associate Information Lines, their supervisor or through Walmart One. A late arrival that is more than 10 minutes in duration results in a point. An unauthorized absence results in a point. After accruing five points, an employee is terminated. Disciplinary warnings are not issued prior to terminating an employee

for attendance, although employees have access to their point totals at all times. The employer provided a copy of the attendance policy. (Exhibit 2)

The employer provided an attendance tracking report which shows all absences the claimant accrued from January 1, 2020 through August 4, 2021. (Exhibit 1) It lists the claimant's final absence occurring on April 20, 2021. The attendance report indicates the claimant was excused from working that day due to illness or injury.

On April 22, 2021, the claimant was not scheduled to work according to the attendance report. The claimant was terminated on that date by Ms. Steth. The employer did not make this first-hand witness available because she was not scheduled to work on the day of the hearing. It did not attempt to postpone the hearing to a time when she would be available. Assistant Store Manager Brandon Rice said he did not know whether the claimant was scheduled to work on April 22, 2021. He similarly did not know if she attempted to call in prior to the start of her shift to be excused from work on April 22, 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to a non-disqualifying reason. The administrative law judge further concludes the overpayment issues are moot because the claimant is entitled to 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.

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*, supra; *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*, supra. 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 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Iowa Admin. Code r.871-24.32(8) provides:

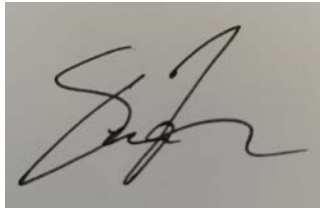
(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Here, the employer has provided exhibits that appear to show the claimant was terminated immediately after being absent because she was sick. Such absences cannot constitute misconduct as a matter of law. See Iowa Admin. Code r. 871-24.32(7). The employer also

elected to provide witness testimony that was not based on first-hand knowledge or experience. The employer has not met its burden because according to its own exhibits the final incident was not an instance of work-related misconduct. Since the employer cannot point to a current act leading to the claimant's separation, it has failed to satisfy its burden. Benefits are granted.

DECISION:

The August 23, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged due to absences excused due to illness. The overpayment issues are moot because the claimant is entitled to benefits. Benefits are granted, provided she is otherwise eligible.

A handwritten signature in black ink, appearing to read 'S. Nelson', is shown on a light gray background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

November 8, 2021
Decision Dated and Mailed

smn/scn