

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JENIFER L JOHNSON**  
Claimant

**WAL-MART STORES INC**  
Employer

**APPEAL 17A-UI-09965-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/27/17**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 13, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 16, 2017. Claimant participated. Employer participated through assistant manager Archie Smith. Assistant manager Wil Shields registered for the hearing on behalf of the employer, but he did not attend the hearing. Claimant Exhibit A was admitted into evidence with no objection.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a department manager from June 16, 2005, and was separated from employment on August 24, 2017, when she was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employees are discharged upon receiving nine attendance points in a rolling six month period. Employees receive .5 points for a tardy (if an employee over 120 minutes late, they receive one point), one point for an absence, and four points for a no-call/no-show. Employees can access their attendance record to determine their attendance points. Employees are not automatically notified when they receive an attendance point. The employer requires employees contact the employer and report their absence prior to the start of their shift. Claimant was aware of the employer's policy.

The final incident occurred when claimant was tardy on August 24, 2017 to her shift. Claimant Exhibit A. Claimant is not sure why she was late on August 24, 2017. Claimants tardy gave her a total of nine attendance points. The employer then discharged claimant on August 24, 2017.

Claimant received a verbal warning from Mr. Smith for her attendance infractions in May 2017. Claimant testified that was the only warning she received regarding her attendance infractions. Claimant denied receiving a verbal warning from Mr. Shields on July 20, 2017. Claimant was absent, tardy or left early from work and received attendance points on: August 24, 2017 (tardy), August 18, 2017 (tardy), August 10, 2017 (tardy), August 3, 2017 (tardy), July 31, 2017 (tardy), July 17, 2017 (tardy), July 13, 2017 (tardy), June 23, 2017 (tardy), June 20, 2017 (tardy), June 19, 2017 (tardy), June 5, 2017 (tardy, but received one point), June 1, 2017 (left early for doctor appointment), May 30, 2017 (tardy), April 26, 2017 (left early for doctor appointment, but received one point), and April 10, 2017 (tardy). Claimant testified most of her tardies were due to traffic or she was stopped by the daycare when she dropped her child off. Claimant Exhibit A.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Although Mr. Smith warned claimant about her absenteeism in May 2017, he did not warn her that her job was in jeopardy. Claimant credibly testified that Mr. Shields did not warn her about her absenteeism on July 20, 2017. Claimant's testimony was corroborated by the evidence presented that the employer removed her attendance points for her absence on July 19, 2017. Furthermore, after Mr. Smith gave claimant her only warning in May 2017, she continued to have multiple attendance infractions without receiving any additional warnings. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof of establishing disqualifying job misconduct. Benefits are allowed.

**DECISION:**

The September 13, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/scn