

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JUSTIN E HARVEY**  
Claimant

**WALMART INC.**  
Employer

**APPEAL 18A-UI-09069-AW-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/05/18  
Claimant: Appellant (2)**

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Iowa Code § 96.5(2) – Discharge for Misconduct  
Iowa Admin Code r. 871-24.32 – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Justin Harvey, Claimant, filed an appeal from the August 24, 2018, (reference 01) unemployment insurance decision that denied benefits because he was discharged from work with Walmart Inc. for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on September 18, 2018 at 11:00 a.m. Claimant participated. Employer did not participate. No exhibits were admitted.

**ISSUE:**

Whether Claimant's separation was a discharge for disqualifying job-related misconduct.

**FINDINGS OF FACT:**

As claimant was the only witness, the administrative law judge makes the following findings of fact based solely upon claimant's testimony: Claimant was employed full-time as an Asset Protection Associate for Walmart Inc. from October 7, 2017 until his employment ended on August 3, 2018. Claimant's schedule varied. Claimant's direct supervisor was Abby Smothers, Store Manager.

Claimant was absent from work from April 13, 2018 to June 19, 2018 due to illness. Claimant notified employer of his illness on April 16, 2018 and requested a leave of absence to receive treatment. Claimant was mentally unable to contact employer on April 13, 2018 through April 16, 2018 due to the nature of his illness. Claimant worked with employer's third party company regarding his leave of absence, documentation and the date claimant expected to return to work. Claimant was under the care of two physicians during his leave of absence. One physician completed a statement for the period of April 26, 2018 to June 19, 2018 and submitted it to the third party company. Another physician was to provide a statement for the period of April 13, 2018 through April 25, 2018. Claimant returned to work on June 21, 2018.

On July 26, 2018, claimant was 12 minutes late to work due to traffic. On another occasion in July, claimant was a few minutes late to work due to traffic. Claimant did not notify employer that he would be tardy on either occasion. Employer has a policy that more than 10 minutes

after the beginning of an employee's shift is considered tardy and that employees should report absences by calling a hotline and their direct supervisor. Employer has a point-based disciplinary system in which each infraction is allocated a point amount and an employee is terminated after accruing a certain number of points. Claimant was aware of employer's policies. Claimant had no other absences or occurrences of tardiness and had not received any warnings related to his attendance.

On July 30, 2018, a human resources employee told claimant that they had not received the physician's statement for April 13, 2018 through April 25, 2018. Claimant was not warned that his employment may be terminated if the physician's statement was not received by employer. Claimant obtained the physician's statement for the period of April 13, 2018 through April 25, 2018 on August 3, 2018. On August 3, 2018, the assistant store manager terminated claimant's employment due to the number of points claimant had accrued under the employer's point-based disciplinary system. Claimant informed employer that he had the physician's statement, but it did not affect the employer's decision to discharge claimant.

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

For the reasons that follow, the administrative law judge concludes the claimant was not discharged due to job-related misconduct. Benefits are allowed if claimant is otherwise eligible.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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.

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.

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). Employee misconduct must be a current act in order to deny unemployment benefits. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985).

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 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10. Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191.

Because claimant's absences from April 13, 2018 through June 19, 2018 were due to illness and were properly reported to employer, they are excused. Claimant's two occasions of tardiness in July 2018 were not for reasonable grounds and were not properly reported to the employer; therefore, the two occasions of tardiness are unexcused. Claimant never received a warning regarding his attendance or tardiness and had no other incidents of absence or tardiness. Claimant's two occasions of unexcused tardiness are not excessive. Furthermore, claimant's tardiness on July 26, 2018 is too far removed from his termination on August 3, 2018

to be considered a current or final act of misconduct. Employer has not met its burden of proof; work-related misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

**DECISION:**

The August 24, 2018, (reference 01) unemployment insurance decision is reversed. Benefits are allowed if the claimant is otherwise eligible.

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Decision Dated and Mailed

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