

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**AISHA D CONLEY**

Claimant

**APPEAL 17A-UI-07980-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**OC: 07/02/17**

**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 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the July 26, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish the discharge was for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on August 23, 2017, and continued to August 25, 2017. The claimant, Aisha D. Conley, participated. The employer, Wal-Mart Stores, Inc., participated through Christina Greene, Assistant Manager. Employer's Exhibits 1 through 8 were received and admitted into the record without objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a membership associate, from January 22, 2015, until June 19, 2017, when she was discharged for absenteeism. Claimant's final absence occurred on June 6, 2017. She called in and reported that she could not come to work because she was stranded out of state due to car problems. Claimant received a Third-Level Written Coaching on July 16, 2016, for absenteeism. She was informed that the next step would be termination. (Exhibit 6) At some point around the beginning of 2017, claimant had a conversation with her supervisor and was told that several of her disciplinary warnings had fallen off her employment record.

Prior to claimant's final absence, she had a history of late arrivals to work. On May 25, 2017, claimant was sixteen minutes late for work. On May 13, claimant was thirty-nine minutes late

for work. On May 5, claimant was twelve minutes late for work. These three late arrivals amounted to one “accrued absence” for the employer’s points system. On April 5, 2017, claimant was absent for her entire shift. On March 30, claimant was thirteen minutes late to work. On March 22, claimant was one hour and twenty-two minutes late to work. On March 4, claimant was seventeen minutes late to work. These three late arrivals amounted to one “accrued absence” for the employer’s points system. On February 25, claimant was one hour and ten minutes late to work. On February 3, claimant was one hour and twenty-two minutes late to work. On November 9, 2016, claimant was one hour and twelve minutes late to work. These three late arrivals amounted to one “accrued absence” for the employer’s points system. The employer’s Attendance Tracking Maintenance Report shows that claimant also arrived late or left early multiple times with management’s approval. (Exhibit 8) Both parties explained that this often occurred in order to keep claimant at or under forty hours for the work week.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,988.00, since filing a claim with an effective date of July 2, 2017, for the seven weeks ending August 19, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview. The employer submitted documentation to the fact-finder for the interview.

#### **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 § 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*, 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 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's testimony that she was not aware her job was in jeopardy to be believable. 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. Claimant last received a disciplinary action for her attendance in July 2016, and she was allowed to arrive late or miss work repeatedly after that date without any consequence. While claimant may have generally been on notice of the employer's attendance expectations, she had no reasonable idea that her final absence would lead to her discharge. The employer has not met its burden of proving claimant was discharged for disqualifying misconduct. Benefits are allowed. As claimant's separation from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

**DECISION:**

The July 26, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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