

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LASHAWNA B MCKINLEY
Claimant

WAL-MART STORES INC
Employer

APPEAL 16A-UI-06876-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/22/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 14, 2016 (reference 01) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on July 8, 2016. The claimant, Lashawna B. McKinley, participated personally and through witness Matt Wanat. The employer, Wal-Mart Stores, Inc., participated through Assistant Manager Danelle Pike.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a sales floor associate. She was employed from September 26, 2015 until May 6, 2016. Claimant's job duties included unloading trucks, stocking shelves with product, and helping customers. Her hours were 2:00 p.m. to 11:00 p.m. but the days she worked varied.

The employer has an attendance policy stating that if an employee reaches nine points they are discharged. Half points and full points are assessed according to how long the employee is gone during their scheduled shift. The policy further states that if an employee must notify management prior to their scheduled shift start time if they are going to be tardy or absent. This is a no-fault attendance policy.

Claimant had received a verbal warning in February 2016, regarding her attendance. She was told by Mr. Wanat at that time that she could be subject to discharge for another absence.

The employer changed their attendance policy on March 1, 2016, and each employee started with no points assessed to them. Claimant had access to the employer's attendance policy as well as the number of points she had assessed by virtue of the employer's internal computer network.

On May 5, 2016, claimant left work early because she had to take care of her nephew. She had temporary custody of her nephew. Her nephew is seven-years old. She did not notify management that she would not be returning to work after her lunch break. This absence was unexcused.

On April 30, 2016, claimant was tardy to work. She did report to management that she would be tardy. She was tardy to work because she was having difficulty finding a babysitter for her nephew. This absence was unexcused.

On April 24, 2016, claimant left work early. She did report to management that she was leaving early. Claimant does not remember why she left early and the employer was not given a reason why she left early. This absence was unexcused.

On April 21, 2016, claimant did not report to work for her shift. She did report to management that she was not going to be able to work her shift prior to her scheduled shift start time. Claimant does not remember why she did not report to work on this date and the employer was not given a reason why she could not report to work on this date. This absence was unexcused.

On April 9, 2016, claimant did not report to work for her shift. She did report to management that she was not going to be able to work her shift prior to her scheduled shift start time. Claimant does not remember why she did not report to work on this date and the employer was not given a reason why she could not report to work on this date. This absence was unexcused.

On April 8, 2016, claimant was tardy to work. She did report her tardiness to management prior to her scheduled shift start time. Claimant does not remember why she was tardy on this date and the employer was not given a reason why claimant was tardy on this date. This absence was unexcused.

On April 7, 2016, claimant did not report to work for her shift. She did report to management that she was not going to be able to work her shift prior to her scheduled shift start time. Claimant does not specifically remember why she did not report to work on this date but believes it is possible her nephew was ill and she had to take care of him. The employer was not given a reason why she could not report to work on this date. This absence was unexcused.

On April 3, 2016, claimant did not report to work for her shift. She did report to management that she was not going to be able to work her shift prior to her scheduled shift start time. Claimant does not remember why she did not report to work for her shift on this date and the employer was not given a reason why she could not report to work on this date. This absence was unexcused.

On March 27, 2016, claimant left early from her shift. She did report to management that she was leaving early from her shift. Claimant was ill on this date. This absence was excused.

On March 23, 2016, claimant did not report to work for her shift. She did report to management that she was not going to be able to work her shift prior to her scheduled shift start time. Claimant was unable to work her shift on this date because her sister and her nephew's father were fighting and the police were called to her apartment. This absence was unexcused.

On March 16, 2016, claimant did not report to work for her shift. She did report to management that she was not going to be able to work her shift prior to her scheduled shift start time. Claimant does not remember why she did not report to work for her shift on this date and the employer was not given a reason why she could not report to work on this date. This absence was unexcused.

Claimant was discharged for absenteeism on May 6, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

As a preliminary matter, I find that claimant did not quit. Claimant was discharged from employment for job-related misconduct.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 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). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). 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." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

In this case, the claimant had received a verbal warning that she could be subject to discharge due to her absenteeism. She was aware that the employer changed their attendance policy as of March 1, 2016 and claimant had access to a copy of that policy. The claimant knew that she needed to come to work on time. She understood the attendance policy and the employer's point system.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

In this case claimant had ten unexcused absences in less than a 60-day time period. Ten unexcused absences in less than 60 days are excessive.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on May 5, 2016 was not excused. The final absence in combination with the claimant's history of unexcused absenteeism is job-related misconduct. Benefits are denied.

DECISION:

The June 14, 2016 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld in regards to this employer until such time as she is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/can