

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GHABRYEL S MYERS
Claimant

WALMART INC
Employer

APPEAL 18A-UI-10614-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/23/18
Claimant: Respondent (2)

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 October 15, 2018 (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 telephonic hearing was held on November 7, 2018. The claimant, Ghabryel S. Myers, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, WalMart, Inc., participated through Angel Boring, Store Manager. Employer's Exhibits 1 through 20 were received and admitted into the record. The administrative law judge took official notice of the administrative record.

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 an overnight stocker, from June 5, 2018, until September 28, 2018, when the employer determined that he had resigned. Claimant was on a leave of absence for a non-work-related injury between August 27 and September 8, 2018. Claimant had lifting restrictions from his doctor that prevented him from doing his job, and these restrictions were scheduled to end on September 10, 2018. Claimant was scheduled to return to work on September 11, but he did not return as scheduled. Claimant reached out to the third-party leave administrator at some point and requested an extension of time in which to file the paperwork he needed to have his leave approved. Claimant never requested an extension of his leave of absence or expressed to the employer that he needed additional time to heal.

Claimant missed his scheduled shifts on September 11, September 12, September 14, September 15, September 16, September 19, September 20, September 21, September 22, September 23, September 24, and September 26, 2018. Claimant did not call the employer to report that he would be absent for any of these shifts. The employer had some contact with claimant between the last date that he worked and the date his employment ended. The employer mailed claimant a letter on September 19, 2018, stating that his Accommodation Service Center request was being closed because his doctor's restrictions had ended. (Exhibit 4) During a telephone call with the employer on September 21, claimant acknowledged receiving this letter. Human Resources attempted to reach him again on September 24 and September 27 to help facilitate his return to work, but claimant did not take these calls. Ultimately, because claimant had not returned to work and stopped communicating with the employer, the employer ended claimant's employment.

The administrative record reflects that claimant has received no unemployment benefits since filing a claim with an effective date of September 23, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal. Boring personally participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

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.

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). When no excuse is given for an absence at the time of the absence and no reason is given in the record, an absence is deemed unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984). See also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. However, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. In this case, claimant was scheduled to return from a leave of absence and did not return. He missed twelve consecutive shifts and did not call in to report that he would be absent for any of these shifts. Additionally, claimant stopped responding to the employer's efforts to contact him after having been told that his leave had expired and he needed to return to work. The employer could not reasonably issue claimant a warning for these consecutive absences, as he was not reporting to work or responding to efforts to reach him. Claimant's final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

Claimant has not filed any weekly continued claims or received any benefits since separating from this employer. Therefore, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The October 15, 2018 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot, as claimant has not received any benefits since separating from this employer.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn