

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

**JAMES W OGLE**  
Claimant

**APPEAL NO. 19A-UI-02196-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WALMART INC**  
Employer

**OC: 02/10/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

James Ogle filed a timely appeal from the March 4, 2019, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Ogle was discharged on January 23, 2019 for excessive unexcused absences. After due notice was issued, a hearing was held on March 28, 2019. Mr. Ogle participated. Stacey Vannoni represented the employer and presented additional testimony through Michael Klein.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: James Ogle was employed by Walmart, Inc. as a full-time maintenance associate at the Oskaloosa Walmart from 2014 until January 17, 2019, when the employer discharged him for attendance. Mr. Ogle's work hours were 10:00 p.m. to 7:00 a.m. His work week began on Tuesday evening and ended on Saturday morning. Assistant Manager Michael Klein was Mr. Ogle's immediate supervisor. If Mr. Ogle needed to be absent from or late for work, the employer's attendance policy required that Mr. Ogle provide notice to the employer no later than two hours after the scheduled start of his shift by calling the store directly and speaking with a manager or by calling the toll-free absence reporting number. Mr. Ogle was at all relevant times aware of the absence reporting requirement.

The final absence that triggered the discharge occurred on January 11, 2019. Mr. Ogle decided not to report for that shift after he heard "talk of" an anticipated snow storm that was expected to bring more than six inches of snow to the area. Mr. Ogle lives in Lovilia, Iowa and commuted to the workplace in Oskaloosa. Mr. Ogle owns a front-wheel-drive Honda CRV. Mr. Ogle decided

not to attempt the drive to work even though no school closings were announced. Mr. Ogle was aware that the employer factored in local school closings when deciding whether to issue attendance points for absences associated with inclement weather. Mr. Ogle is uncertain whether the Iowa Department of Transportation had issued a travel advisory for his area that day. Mr. Ogle properly notified the employer of his need to be absent. Mr. Ogle called the toll-free absence reporting number and selected "natural disaster" as the basis for his absence. All of the earlier absences the employer considered when making the discharge decision were due to illness and were properly reported to the employer. The employer notified Mr. Ogle of the discharge decision on January 17, 2019.

During the period of Mr. Ogle's employment, the employer abandoned the practice of issuing written warnings for attendance. The employer instead expected employees to monitor their attendance and attendance points. Mr. Ogle regularly checked his attendance points via an Internet portal and was aware of his accumulated attendance points at all relevant times.

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

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence in the record establishes a final absence on January 11, 2019 that was an unexcused absence under the applicable law. In the context of Iowa weather, a reasonable person would not deem mere “talk of” anticipated snowfall to be a reasonable basis for missing work. Mr. Ogle owns a snow-worthy vehicle. Mr. Ogle prematurely and unreasonably decided to skip his shift on January 11, 2019. The weight of the evidence establishes that all of the other absences the employer considered when making the discharge decision were due to illness, were properly reported, and therefore were excused absences under the applicable law. The evidence does not establish excessive unexcused absences within the meaning of the law. Mr. Ogle was discharged for no disqualifying reason. Accordingly, Mr. Ogle is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

**DECISION:**

The March 4, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective January 17, 2019. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs