

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE L DREW
Claimant

APPEAL NO. 14A-UI-09584-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/17/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Michelle Drew filed a timely appeal from the September 3, 2014, reference 01, decision that disqualified her for benefits. After due notice was issued, a hearing was held on October 6, 2014. Ms. Drew participated. Craig Preston represented the employer and presented additional testimony through Rochelle Duffy.

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: Michelle Drew was employed by Wal-Mart as a full-time overnight support manager from 2012 until August 18, 2014, when the employer discharged her for attendance. The final absence that triggered the discharge occurred on August 12, 2014. On that day, Ms. Drew appeared for work to assist with interviewing a prospective new employee. When she arrived for work, Ms. Drew learned that the new employee had rescheduled the interview. Ms. Drew had arrived for work out of uniform. Ms. Drew left the workplace less than an hour after she arrived. Earlier in the day, an assistant manager had telephone Ms. Drew to confirm that she would be present to assist with the interview. As of that contact, Ms. Drew knew she was expected to appear for work that evening. Ms. Drew was next scheduled to work on August 17, 2014, but did not appear for work. When Ms. Drew did not appear for work or notify the employer of a need to be absent, the employer contacted Ms. Drew and she stated that she was under the impression, based on a conversation on August 11, 2014, that she was no longer employed.

On August 11, 2014, Ms. Drew had abandoned her shift an hour and 42 minutes prior to the scheduled end of her shift because she was upset that the supervising assistant manager had sent an overnight stocker home and left Ms. Drew to perform the employee's stocking work. Ms. Drew concluded there was more work to get done than she could complete before the scheduled end of her shift. Ms. Drew elected not to stay and perform what she could get done by the end of her regular shift. During the shift, an assistant manager had given Ms. Drew the

choice of completing her shift, resigning from the employment, or leaving without performing and being discharged from the employment. Ms. Drew had elected to leave without permission. Ms. Drew had then return to conduct the interview the next evening.

On August 6, 2014, Ms. Drew had been late to work due to transportation issues that had started at the end of May 2014. From the end of May onward, Ms. Drew had been late to work due to transportation issues multiple five times leading up to the August 6 tardiness. Ms. Drew had earlier been late getting to work on several occasions due to personal reasons. Ms. Drew had also been absent due to illness and had properly reported the illness-related absences to the employer.

REASONING AND CONCLUSIONS OF LAW:

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 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).

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). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 871 IAC 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 871 IAC 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 excessive unexcused absences. Whether the administrative law judge deems the August 11, August 12 or August 17 absence the final absence that triggered the discharge, each was an unexcused absence under the applicable law. These absences followed many other unexcused absences. Ms. Drew’s pattern of unexcused absences constituted misconduct in connection with the employment. Ms. Drew is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer’s account shall not be charged for benefits.

DECISION:

The claims deputy's September 3, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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