

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER L SALIN
Claimant

APPEAL NO. 06A-UI-10195-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 09/17/06 R: 02
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the October 11, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 1, 2006. Claimant Jennifer Salin participated. Tim Lange was also present as a witness for Ms. Salin, but did not provide testimony. Assistant Manager Craig Bender represented the employer. Employer's Exhibits One through Nine were received into evidence. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant.

ISSUE:

Whether Ms. Salin was discharged for misconduct, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits. She was not.
Whether the discharge was based on a "current act." It was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer Salin was employed by Wal-Mart on a full-time basis from July 8, 2003 until August 23, 2006, when Store Manager and Assistant Manager Craig Bender discharged her for attendance. There was no other basis for the discharge aside from attendance issues. At the time of separation, Ms. Salin was a sales coordinator in the shoe department. Ms. Salin worked 10:00 a.m. to 7:00 p.m., Tuesday through Saturday.

The employer has a written attendance policy. Under the policy, Ms. Salin was required to notify her immediate supervisor or another member of management at least one hour prior to the scheduled start of her shift if she needed to be absent. The final absence that prompted the discharge occurred on August 23, 2006. On that date, Ms. Salin was absent due to illness. At 4:00 a.m., Ms. Salin notified an assistant manager that she would be absent from her 10:00 a.m. shift.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Salin was discharged for misconduct in connection with the employment. It does not.

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.

871 IAC 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 Department of Job Service, 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 Ms. Salin's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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).

The evidence in the record establishes that the final absence that prompted the discharge was an absence for illness properly reported to the employer. Accordingly, the absence was an excused absence under the applicable law. Because the final absence that prompted the discharge was an excused absence, the evidence in the record fails to establish a "current act" of misconduct upon which a disqualification for benefits might be based and the administrative law judge need not consider the prior absences. See 871 IAC 24.32(8). Ms. Salin was discharged for no disqualifying reason. Ms. Salin is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Salin.

DECISION:

The Agency representative's October 11, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs