

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASIA J BAKER
Claimant

APPEAL NO. 09A-UI-17060-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**Original Claim: 08/30/09
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Asia Baker filed a timely appeal from the September 30, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 17, 2009. Ms. Baker participated. At the scheduled start of the hearing, Diane Small, Assistant Manager, indicated that the employer elected not to participate.

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: Asia Baker was employed by Wal-Mart as a part-time cashier from January 2009 until August 28, 2009, when a supervisor discharged her for alleged excessive unexcused absences. Ms. Baker started her college studies at the end of August 2009. Ms. Baker had previously given her supervisor a class schedule and work availability schedule. The supervisor had agreed to schedule around Ms. Baker's class schedule. Ms. Baker attended school from 9:00 a.m. to 1:50 p.m. on Monday, 6:00 p.m. to 9:30 p.m. on Tuesday, 9:00 a.m. to 12:40 p.m. on Wednesday and Thursday, and 9:00 to 10:50 a.m. on Friday. Though the supervisor had agreed to accommodate the class schedule, when the supervisor completed the work schedule, the supervisor scheduled Ms. Baker to work at times when she was supposed to be attending classes. Ms. Baker brought this to the supervisor's attention. The supervisor told Ms. Baker that she would have to switch shifts with another employee. Ms. Baker had requested a Tuesday off so she could attend a mandatory meeting for college freshmen. The supervisor scheduled Ms. Baker to work that evening. Ms. Baker arranged for another employee to cover the shift, with the approval of the supervisor, but lost work hours as a result. Shortly after Ms. Baker appeared for work on August 28, the supervisor summoned Ms. Baker to a meeting and discharged her from the employment for alleged excessive unexcused absences. Ms. Baker asked for the dates of the alleged unexcused absences. The supervisor told Ms. Baker she did not have a right to review the information.

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.

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.

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).

The employer waived its right to participate in a hearing and has thereby presented no evidence whatsoever to support the allegation that Ms. Baker was discharged for excessive unexcused absences or other misconduct. The evidence in the record indicates that Ms. Baker was absent from one shift, had arranged for another employee to cover the shift, and that the employer had approved the absence. Under the circumstances, the evidence indicates an excused absence. The evidence indicates no unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Baker was discharged for no disqualifying reason. Accordingly, Ms. Baker is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Baker.

DECISION:

The Agency representative's September 30, 2009, reference 01, decision is reversed. 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/kjw