IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HEATHER A LOEBS
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 17A-UI-02160-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/29/17
Claimant: Appellant (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(21) – Quit in Lieu of Discharge

STATEMENT OF THE CASE:

Heather Loebs filed a timely appeal from the February 21, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits. After due notice was issued, a hearing was held on March 20, 2017. Ms. Loebs participated. Sarah Kinnetz represented the employer and presented additional testimony through Mark Boyd.

ISSUE:

Whether Ms. Loebs separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Heather Loebs was employed by Wal-Mart as a full-time Self-Checkout Host from September 2016 until February 2, 2017. Ms. Loebs' immediate supervisor was Assistant Manager Linda Miller.

On January 31, 2017, Ms. Miller reminded Ms. Loebs that Ms. Loebs had incurred three attendance points. Ms. Miller told Ms. Loebs that if she missed another shift, she would be without a job. Under the employer's attendance policy a new employee is subject to being discharged from the employment if the employee incurs four attendance points within the first six months of the employment. The employer has discontinued the practice of issuing formal reprimands for attendance. Instead, the employer expects employees to monitor their own attendance issues, including the number of attendance "occurrences" they have accumulated.

On February 2, 2017, Ms. Loebs appeared for work despite being ill. Ms. Loebs was scheduled to work from 1:00 p.m. to 10:00 p.m. Ms. Loebs' illness required that she spend substantial time in the restroom and away from her work station. At 2:30 p.m., Ms. Loebs concluded that she was too ill to remain at work. Ms. Loebs was distraught at the thought of leaving her shift early because she knew, based on Ms. Miller's warning two days earlier, the early departure would cost her the employment. Ms. Loebs notified a customer service manager of her need to leave

early and stated that she knew she would lose her job. The customer service manager summoned Assistant Manager Mark Boyd to speak with Ms. Loebs at the service desk. Mr. Boyd spoke with the customer services managers before he spoke to Ms. Loebs. The customer service managers told Mr. Boyd that Ms. Loebs was sick and wanted to go home. They also told Mr. Boyd that Ms. Loebs had stated she would be out of points and out of a job. Mr. Boyd then went to Ms. Loebs' work station and spoke with Ms. Loebs. Ms. Loebs told Mr. Boyd that she was feeling ill and wanted to go home. Mr. Boyd observed that Ms. Loebs appeared distraught and had been weeping. Ms. Loebs told Mr. Boyd that she was on her last strike and did not want to lose her job. Mr. Boyd told Ms. Loebs that he would hate to lose her. Ms. Loebs asked Mr. Boyd whether she would be fired. Mr. Boyd told Ms. Loebs that he did not know because he did not know her point history. Mr. Boyd told Ms. Loebs that it was her decision to make, meaning that if Ms. Loebs had exhausted her available attendance points, her earlier departure would indeed cost her the employment. Ms. Loebs took her employer-issued items to the personnel office and left them on the desk. Ms. Loebs then left the workplace and did not return.

REASONING AND CONCLUSIONS OF LAW:

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The weight of the evidence in the record establishes that Ms. Loebs reasonably concluded on February 2, 2017 that she was automatically discharged from the employment based on her need to leave work early that day due to illness. Two days earlier, Ms. Miller had specifically told Ms. Loebs that the next absence would mean loss of the employment. Ms. Loebs clearly communicated this belief during her contact with the employer on February 2. Mr. Boyd did nothing to disabuse Ms. Loebs of her belief that her departure meant she would be automatically discharged.

Because the administrative law judge concludes that Ms. Loebs reasonably concluded that her early departure on February 2 meant she was discharged from the employment, the question becomes whether the separation was based on disqualifying misconduct.

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(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).

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 that the final absence was due to illness and was properly reported to the employer. Accordingly, the final absence was an excused absence under the applicable law. Because Ms. Loebs' final absence was an excused absence under the applicable law, the evidence in the record fails to establish a current act of misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Loebs was discharged for no disqualifying reason. Accordingly, Ms. Loebs is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 21, 2017, reference 01, decision is reversed. The claimant was discharged on February 2, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. 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