

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JULIAN W SHAW
Claimant

APPEAL NO. 19A-UI-00645-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 12/16/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Julian Shaw filed a timely appeal from the January 14, 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. Shaw was discharged on December 19, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on February 7, 2019. Mr. Shaw participated. Brittany Finley represented the employer and presented additional testimony through Lisa Anglen.

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: Julian Shaw was employed by Walmart, Inc., doing business as Sam's Club, as a part-time meat department employee from March 2018 until December 18, 2018, when the employer discharged him from the employment for attendance. Assistant Manager Daren Check was Mr. Shaw's immediate supervisor. Prior to November 17, 2018, Mr. Shaw's work hours varied and he did not have a routine work schedule. If Mr. Shaw needed to be absent from work, the employer's written attendance policy stated that Mr. Shaw was to call the designated absence reporting number at least an hour prior to the scheduled start of the shift and leave a message in response to the automated prompts. Based on information the employer provided during orientation, Mr. Shaw operated under the belief that he had to provide notice at least two hours prior to the scheduled start of the shift, that the contact needed to include speaking with a supervisor, and that contact with the supervisor was an accepted substitute for calling the absence reporting line.

On November 17, 2018, Mr. Shaw and Mr. Check agreed to a weekly work schedule for Mr. Shaw that would allow Mr. Shaw to better fulfill his parenting responsibilities. Mr. Shaw has a five-year-old son who has breathing and allergy issues. On November 17, Mr. Check and Mr. Shaw signed an agreement that stated Mr. Shaw would thereafter work 9:00 a.m. to

2:30 p.m. on Monday, Tuesday, Thursday and Friday. Mr. Shaw wanted Wednesdays off because his son was released from school early on Wednesdays.

At the time the agreement was executed, Mr. Check had already posted work schedules for the period that included November 17 through December 7, 2018. That included shifts for Mr. Shaw on December 3, 4 and 5, Monday through Wednesday. At the time the agreement was executed, Mr. Check had not yet posted a schedule for the period beginning December 8, 2018. On November 21, 2018, Mr. Check posted the work schedule for the period of December 8-14, 2018. That schedule included shifts for Mr. Shaw on Wednesday, December 12 and Saturday, December 15.

On December 3, 2018, Mr. Shaw contacted Mr. Check at 7:00 a.m. to give proper notice that he would be absent from his 9:00 a.m. to 2:30 p.m. scheduled shift so that he could care for his son, who was sick with a fever.

On December 4, 2018, Mr. Shaw contacted the workplace at 5:00 a.m. and spoke to a loading dock supervisor to give proper notice that he would be absent from his 9:00 a.m. to 2:30 p.m. shift because his son was still ill and he needed to care for his son.

On Wednesday, December 5, 2018, the employer documented Mr. Shaw as absent from his scheduled shift. Mr. Shaw did not report for work and did not contact the employer. Mr. Shaw was operating under the belief, based on the November 17, 2018 agreement that he did not need to report for work on a Wednesday.

When Mr. Shaw returned to work on December 6, 2018, he spoke with Mr. Check about the fact that he was on the schedule to work Wednesday, December 12 and Saturday, December 15, despite the November 17, 2018 scheduling agreement. During that discussion, Mr. Check told Mr. Shaw that he would "get everything fixed." Mr. Check did not take steps to correct the work schedule and Mr. Shaw continued to appear on the work schedule for December 12 and 15.

When Mr. Shaw did not appear for work at 9:00 a.m. on December 12, Kamar Henry, General Manager, called Mr. Shaw. Mr. Henry asked Mr. Shaw what was going on, stated that Mr. Shaw was supposed to work at 9:00 a.m., and told Mr. Shaw he was late. Mr. Shaw told Mr. Henry that pursuant to the work schedule he and Mr. Check had agreed to, Mr. Shaw was supposed to be off work on Wednesdays. Mr. Henry told Mr. Shaw that Mr. Check had not told Mr. Henry anything about the scheduling agreement. Mr. Henry then said, "Okay" and hung up. Mr. Shaw did not report for the shift.

The final incident that triggered the employer's decision to discharge Mr. Shaw from the employment concerned an alleged absence on Saturday, December 15, 2018. The employer documented contact with Mr. Shaw on December 15, but the employer witness does not know the time of the contact or the substance of the contact. Mr. Shaw does not recall whether he had contact with the employer on December 15.

When Mr. Shaw reported for work on Tuesday, December 18, 2018, David Jarvinen, Member Experience Manager (front end manager) told Mr. Shaw that he needed to walk with him and that Mr. Shaw was being let go from the employment. Mr. Shaw asked why and Mr. Jarvinen stated the discharge was based on no-call/no-show absences. Mr. Shaw denied that he had been a no-call/no-show for scheduled shifts and produced his copy of the November 17, 2018 written scheduling agreement. Mr. Jarvinen uttered, "Oh crap." Mr. Jarvinen then used his cell phone to take a photo of the scheduling agreement. Mr. Jarvinen stated that he would show the

scheduling agreement to Mr. Henry, but that Mr. Shaw would still be discharged from the employment.

The employer considered several earlier absences during the period of July 10 through October 1 when making the decision to discharge Mr. Shaw from the employment. On July 10 and 11, Mr. Shaw was absent, but neither he nor the employer is able to provide additional information regarding the absences. On July 30, Mr. Shaw left work early due to illness after providing proper notice to Mr. Jarvinen. On July 31, Mr. Shaw was absent, but neither he nor the employer is able to provide additional information regarding the absence. On August 12, Mr. Shaw was absent with proper notice to the employer so that he could care for his sick child. On August 13, 2018, the employer issued a written warning to Mr. Shaw for attendance and punctuality. On August 15, Mr. Shaw was late for work due to transportation issues. On August 16, Mr. Shaw left work early due to illness after providing proper notice to Mr. Henry. On August 30, Mr. Shaw was absent for part of his shift, but neither he nor the employer is able to provide additional information regarding the absence. On September 6, Mr. Shaw was late for work for personal reasons. On September 8, 15 and 16, Mr. Shaw was absent for part of his shift, but neither he nor the employer is able to provide additional information regarding the absences. On October 1, Mr. Shaw was late for work for personal reasons.

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 that does not disqualify Mr. Shaw for unemployment insurance benefits. On December 6, Mr. Check acknowledged that Mr. Shaw was not supposed to have been scheduled to work on December 12 and 15 and agreed to remove those shifts from Mr. Shaw's work schedule in light of the November 17 written scheduling agreement. Accordingly, those two absences cannot be deemed unexcused absences under the applicable law. Mr. Shaw reasonably concluded, based on the November 17 agreement, that he did not need to appear for work on Wednesday, December 5. Accordingly, that absence cannot be deemed an unexcused absence under the applicable law. The December 3 and 4 absences were due to the need to care for a sick child and were properly reported to the employer pursuant to instructions the employer provided to Mr. Shaw at the time of hire. Accordingly, those absences cannot be deemed unexcused absences under the applicable law. One has to look all the way back to the late arrival on October 1, 2018 to

find a late arrival that would be deemed an unexcused absence under the applicable law. Because the evidence fails to establish a discharge based on a current act of misconduct, the discharge does not disqualify Mr. Shaw for unemployment insurance benefits. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the earlier absences or whether they were excused or unexcused under the applicable law. Mr. Shaw is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The January 14, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective December 18, 2018. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs