

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**MARCUS M THOMAS**  
Claimant

**WALMART INC**  
Employer

**APPEAL NO. 24A-UI-03593-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/10/24  
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) & (d) – Discharge

**STATEMENT OF THE CASE:**

On April 5, 2024, Marcus Thomas (claimant) filed a timely appeal from the April 3, 2024 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on March 7, 2024 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on April 25, 2024. Claimant participated and presented additional testimony through Joanna Corrodo. Brian Conner represented the employer and presented additional testimony through Jeff Nudd. Exhibit A was received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Marcus Thomas (claimant) was employed by Walmart, Inc. as a full-time Shipping Loader at a warehouse facility in Mount Pleasant from July 2023 until March 7, 2024, when the employer discharged him for attendance. The claimant's work hours were 5:15 a.m. to 3:15 p.m., Tuesday through Friday. Shipping Managers Jay Meyer and Fulton Jackson were the claimant's supervisors.

If the claimant needed to be absent or late for the shift, the employer's policy required that the claimant call the designated absence reporting number prior to the scheduled start of the shift. The automated absence reporting system would request information including the reason for the absence. If the claimant needed to leave work early, the employer's policy required that the claimant speak with a supervisor prior to leaving the workplace. The employer reviewed the absence reporting policies with the claimant at the start of the employment and provided a copy of the absence reporting requirements and procedure at that time.

The employer's time-off policy included Protected Paid Time Off (PTTO), whereby an employee could accrue time to use for personal matters and then be absent without accruing attendance points.

The final absence that triggered the discharge occurred on March 6, 2024. On that day, the claimant left at 8:30 a.m. to take his significant other to a court appearance. The claimant did not return. The claimant had not requested the time off in advance. The employer is unaware of whether the claimant used PTTO in connection with the absence or with any earlier absence. The claimant asserts he used accrued PTTO for this date and others.

The next most recent absence that factored in the discharge occurred on February 15, 2024 when the claimant missed part of a shift. The employer witness is unable to provide additional information regarding the absence. The claimant asserts he left an hour prior to the end of the shift, spoke to a supervisor, and used accrued PTTO benefit.

The next most recent absence that factored occurred on January 23, 2024, the claimant was absent for the entire shift. The employer witness lacks additional information regarding the absence. The claimant advises the absence was based on a snowstorm, that there was a travel advisory, that he properly notified the employer, and that the employer indicated at the time that the absence would be excused.

The next most recent absence that factored occurred on November 24, 2023, when the claimant missed the entire shift with appropriate notice. The employer witness is unable to provide additional information regarding the absence. The claimant advises he was absent so that he could spend time with his significant other on her birthday and used PTTO.

The next most recent absence that factored occurred on November 21, 2023, when the claimant was absent for part of the shift. The employer witness is unable to provide additional information regarding the absence. The claimant advises that he left an hour prior to the end of the shift, spoke with the supervisor before leaving, and used PTTO.

On November 16 2023, the claimant was absent with proper notice. The employer witness is unable to provide additional information regarding the absence. The claimant does not recall the details of the absence.

On November 24, 2023, the employer spoke with the claimant to let the claimant his accrued attendance points.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...  
(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...  
(9) Excessive unexcused tardiness or absenteeism.

...

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

...  
(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...  
(9) Excessive unexcused tardiness or absenteeism.

...

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 Iowa Administrative Code rule 87124.32(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. 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 87124.32(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 March 7, 2024 discharge for no disqualifying reason. The employer presented insufficient evidence to prove a single unexcused absence. The employer was unable to speak to whether the claimant used accrued PTTO benefits in connection with the absences that factored in the discharge. The employer witnesses were unable to speak to the details of several of the absences that factored in the discharge and were unable to refute the claimant's assertion that he used PTTO benefits to secure approved time off in connection with each of the absences aside from January 23, 2024. On that day, the absence was due to inclement weather, was properly reported, and would be an excused absence under the applicable law. The evidence does not establish excessive unexcused absences, a knowing violation of a uniformly enforced work rule, or any other misconduct in connection with the employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The April 3, 2024 (reference 01) decision is REVERSED. The claimant was discharged on March 7, 2024 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



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James E. Timberland  
Administrative Law Judge

May 3, 2024  
Decision Dated and Mailed

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
6200 Park Ave Suite 100  
Des Moines, Iowa 50321  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://eab.iowa.gov)**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
6200 Park Ave Suite 100  
Des Moines, Iowa 50321  
Fax: (515)281-7191  
En línea: [eab.iowa.gov](http://eab.iowa.gov)**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.