

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHRIS T ERSCHEN
Claimant

WALMART INC
Employer

APPEAL NO. 20A-UI-00048-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/08/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Chris Erschen filed a timely appeal from the December 24, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Erschen was discharged on October 10, 2019 for repeated tardiness in reporting for work after being warned. After due notice was issued, a hearing was held on January 23, 2020. Mr. Erschen participated. The employer did not provide a telephone number for the hearing and did not participate. Exhibit A was received into evidence. After the appeal hearing, the Appeals Bureau received written notice from Equifax/Talx that the employer waived participation in the appeal hearing.

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: Chris Erschen was employed by Walmart, Inc. as a full-time custodian from 2016 until November 21, 2019, when the employer discharged him for tardiness. Three months prior to the end of the employment, Mr. Erschen requested to change his work hours to overnight hours and commenced working a 10:00 p.m. to 7:00 a.m. shift five days per week. Mr. Erschen thereafter had Tuesday nights and Wednesday nights off. Mr. Erschen had worked overnight hours earlier in the employment, prior to transitioning to the day shift. The final late arrival that triggered the discharge occurred on November 16, 2019, when Mr. Erschen's truck broke down while Mr. Erschen was driving to work. Mr. Erschen attempted to contact the workplace to give notice of his need to report to work late. No one answered his call. Mr. Erschen walked the remaining 1.5 miles to work. A couple days earlier, Mr. Erschen was late for personal reasons, when he had not budgeted enough time to clean the snow off his car before he traveled to work. Mr. Erschen was late reporting for work on earlier occasions, but utilized Protected Paid Time Off to cover those late arrivals under the belief that those late arrivals would not count against him.

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 for no disqualifying reason. The employer did not participate in the appeal hearing and did not present evidence to meet its burden of proving that the discharge was based on misconduct in connection with the employment. The final late arrival was based on a transportation issue, but one that was beyond Mr. Erschen's control. Mr. Erschen attempted to give notice of his late arrival, but no one answered when he called. There is insufficient evidence in the record to prove an unexcused absence in connection with the final late arrival without inappropriately shifting the burden of proof to Mr. Erschen. The evidence establishes an unexcused absence a couple days before the final absence, when Mr. Erschen failed to budget sufficient time to clean the snow off his car so he could get to work on time. The evidence does not establish additional unexcused absences. The evidence does not establish excessive unexcused absences or other disqualifying misconduct. Mr. Erschen is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The December 24, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge date, according to the evidence presented at the appeal hearing, was November 21, 2019. 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/scn