

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUKE A TABBERT
Claimant

APPEAL NO. 18A-UI-10510-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 09/23/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 10, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 10, 2018, for no disqualifying reason. After due notice was issued, a hearing was held on November 5, 2018. Claimant Luke Tabbert participated and presented additional testimony through Wendy Tabbert. Paul Hanson represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which reflects that no benefits have been disbursed to the claimant in connection with the September 23, 2018 original claim. Exhibits 2 through 7 and 9 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Luke Tabbert was employed by Walmart, Inc. as a full-time department manager until September 10, 2018, when Assistant Manager Paul Hanson, discharged him from the employment for attendance. Mr. Tabbert began his employment in 2014. Mr. Tabbert became a department manager in August 2017. Mr. Hanson was Mr. Tabbert's immediate supervisor. If Mr. Tabbert needed to be absent from work or late for work, the employer's written attendance policy required that Mr. Tabbert notify the employer by calling the designated absence reporting line or notify the employer via an Internet-based absence reporting software application. Mr. Tabbert was at all relevant times aware of the absence reporting requirement. Under the employer's written attendance policy, Mr. Tabbert was subject to discharge from the employment if he incurred nine attendance occurrence points in a rolling six-month period. Mr. Tabbert was at all relevant times aware of the attendance policy and absence reporting requirement.

The final absence that triggered the discharge occurred on September 7, 2018. On that day, Mr. Tabbert reported late for work because he overslept. Also on that same day, Mr. Tabbert left work early due to illness and with proper notice to the employer. Mr. Tabbert was next scheduled to work on September 10, 2018. Mr. Tabbert reported for work on September 10 and was discharged at that time. Prior to the late arrival on September 7, Mr. Tabbert was tardy for personal reasons on 11 other occasions between May 7, 2018 and September 4, 2018. Under the employer's timekeeping practice, the employer would not document an incident of tardiness unless Mr. Tabbert was at least 10 minutes late. The prior late arrivals that factored in the discharge occurred on May 7, July 2, 4, 5 and 12, August 22, 23, 27 and 28, and September 3 and 4.

The employer considered other absences when making the decision to discharge Mr. Tabbert from the employment. On April 5, May 12 and 18 and June 9, 2018, Mr. Tabbert was absent with proper notice to the employer. On June 7 and August 29, 2018, Mr. Tabbert left work early with proper notice to the employer. Neither the employer nor Mr. Tabbert is able to provide additional information concerning these six absences. On September 1, 2018, Mr. Tabbert was absent without notifying the employer because he had not reviewed the posted schedule to see that he was scheduled to work on September 1. On September 5 and 6, 2018, Mr. Tabbert was absent due to illness and properly notified the employer of his need to be absent.

The employer's decision to discharge Mr. Tabbert from the employment followed several discussions between Mr. Hanson and Mr. Tabbert regarding his attendance and accrual of attendance points.

Mr. Tabbert established an original claim for unemployment insurance benefits that was effective September 23, 2018. Mr. Tabbert received no benefits in connection with the claim.

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). 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 a discharge based on excessive unexcused absences. The unexcused absences during the last six months of the employment were the 12 late arrivals between May 7, 2018 and September 7, 2018 and the no-call/no-show absence on September 1, 2018. The late arrivals were due to Mr. Tabbert oversleeping or other matters of personal responsibility. The no-call/no-show was due to Mr. Tabbert not taking reasonable steps to review and heed the posted work schedule. These absences occurred in the context of repeated discussions between Mr. Hanson and Mr. Tabbert regarding the ongoing attendance issues and the need to take appropriate steps to resolve the issue. The pattern of unexcused absences was sufficient to demonstrate a willful and wanton disregard of the employer's interest in maintaining appropriate staffing. The evidence in the record fails to establish any additional unexcused absences beyond the late arrivals and the no-call/no-show. The additional absences were either due to illness and properly reported to the employer or absences for which the employer presented insufficient evidence to establish unexcused absences under the applicable law.

Because the evidence establishes a discharge for misconduct in connection with the employment, Mr. Tabbert is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Tabbert must meet all other eligibility requirements. The employer's account shall not be charged for benefits. Because Mr. Tabbert received no benefits in connection with the claim, there is no overpayment to address.

DECISION:

The October 10, 2018, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn