

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES L LONG
Claimant

APPEAL NO. 19A-UI-00731-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 01/06/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

James Long filed a timely appeal from the January 23, 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. Long was discharged on January 4, 2019 for excessive unexcused absences. After due notice was issued, a hearing was held on February 8, 2019. Mr. Long participated. Alex Martens represented the employer. Exhibits 1, 2 and 3 were received into evidence.

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: James Long was employed by Walmart, Inc. as a part-time cashier from 2013 until January 4, 2019, when Alex Martens, Assistant Manager, discharged him from the employment for attendance. The employer's time clock is located at the back of the Walmart store. The time clock was at all relevant times functioning correctly. The employer also allowed employees to clock in at a point of sale/cash register, so long as the employee clocked in on time. The employer would not document an incident of tardiness unless the late arriving employee clocked in more than ten minutes later than the scheduled start of the shift. Mr. Long was at all relevant times aware of and clock-in requirement. Mr. Long has vision impairment in one eye, but no such issue in his other eye. Mr. Long's vision issue in the one eye did not prevent him from being able to read the clock on the time clock or point of sale/cash register.

If Mr. Long needed to be absent or late for the employment, the employer's written attendance policy required that Mr. Long give notice of the absence by calling a designated absence reporting number at least one hour prior to the scheduled start of the shift. Under the policy, Mr. Long could also provide notice through a Walmart software application called WalmartOne at least one hour prior to the scheduled start of his shift. Under the attendance policy, Mr. Long could be discharged if he incurred nine attendance points in a rolling six-month period.

Mr. Long was at all relevant times aware of the attendance policy and the absence reporting requirement.

The final absence that triggered the discharge occurred on January 4, 2019, when Mr. Long was late for work for personal reasons. Mr. Long has also been late for personal reasons on December 8, 9, 10 and 30, 2018. Mr. Long had also been late for personal reasons on August 19 and on November 4 and 12, 2018. In addition, Mr. Long had been absent without notice on November 26, 2018. The employer considered other absences, several of which were early departures with proper notice to the employer. Under the employer's attendance policy, the employer does not issue warnings or reprimands for attendance, but instead expects employees to monitor their work schedule and their attendance points.

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 excessive unexcused absences. Mr. Long was late for personal reasons four times in December 2018. Each of these late arrivals was an unexcused absence under the applicable law. The late arrivals in December were sufficiently numerous to constitute excessive unexcused absences. However, there were two additional instances in November 2018 and one instance in August 2018 wherein Mr. Long was late for personal reasons. Each of these was an unexcused absence under the applicable law. The evidence establishes a no-call/no-show absence in November 2018, which would be an additional unexcused absence under the applicable law. The weight of the evidence fails to establish a machine malfunction issue or a disability issue caused or contributed to any of these unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Long was discharged for misconduct in connection with the employment. Accordingly, Mr. Long 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. Long must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The January 23, 2019, reference 01, decision is affirmed. The claimant was discharged on January 4, 2019 for misconduct in connection with the employment. 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