

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JAMES W GRUPY
Claimant

APPEAL NO. 18A-UI-06335-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 05/13/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

James Grupy filed a timely appeal from the May 29, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Grupy was discharged on January 7, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on June 25, 2018. Mr. Grupy participated. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Exhibits A and B 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 Grupy was employed by Walmart, Inc. as a full-time night stock associate at the Walmart store in Mount Pleasant until the morning of January 7, 2018, when Assistant Manager Michael Smith notified him that he was discharged from the employment for attendance. Mr. Grupy's work hours in the night stock position were 10:00 p.m. to 7:00 a.m., Friday evening through Wednesday morning. Mr. Grupy lived in Fort Madison and commuted 35 miles to the workplace in Mount Pleasant. Mr. Smith was Mr. Grupy's primary supervisor. Another assistant manager, Duane (last name unknown), also had supervisory authority over Mr. Grupy's employment.

The final absence that triggered the discharge occurred on December 27, 2018, when Mr. Grupy was absent due to inclement weather that made travel unsafe. On that evening, Mr. Grupy got 10 miles into his 35-mile commute when freezing rain made it unsafe to continue his journey to Mount Pleasant. Mr. Grupy's windshield was at that point covered in ice. At about 9:30 p.m., Mr. Grupy contacted the Mount Pleasant Walmart and spoke with Assistant Manager Duane to give notice that he would not be able to report to work due to the weather.

Mr. Grupy also called the designated absence reporting number to comply with the employer's absence reporting policy.

The employer considered earlier absences when making the decision to discharge Mr. Grupy from the employment. Prior to the December 27, 2017 final absence, the next most recent absence that factored in the discharge occurred on December 19, 2017.

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 Iowa Administrative Code rule 871-24.32(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 871-24.32(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 evidence in the record establishes a final absence on December 27, 2017 that was due to inclement weather that made travel unsafe. The evidence establishes that Mr. Grupy properly notified the employer of that absence. Because the absence was due to weather conditions, something beyond Mr. Grupy's control, and because the absence was properly reported to the employer, the absence was an excused absence under the applicable law. The evidence does not establish subsequent absences. Because the final absence that triggered the discharge was an excused absence under the applicable law, the evidence fails to establish a current act of misconduct. 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 absences under the applicable law.

Because the evidence establishes a discharge for no disqualifying reason, Mr. Grupy is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 29, 2018, reference 01, decision is reversed. The claimant was discharged on January 7, 2018 for no disqualifying reason. The discharge was not based on a current act of misconduct. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs