

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**KAITLIN DOREMUS**  
Claimant

**APPEAL NO: 18A-UI-11641-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WALMART INC**  
Employer

**OC: 11/04/18**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Kaitlin Doremus filed an appeal from the November 26, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Doremus was discharged on October 21, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on December 17, 2018. Ms. Doremus participated. Abbi Andersen represented the employer.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Kaitlin Doremus was employed by Walmart, Inc. as a part-time cashier from October 2017 until October 21, 2018, when Abbi Andersen, Assistant Store Manager, discharged her from the employment for attendance. Ms. Doremus worked at the Walmart store on 16th Street in Council Bluffs. Ms. Andersen was Ms. Doremus' supervisor. Under the employer's attendance policy, Ms. Doremus was required to notify the employer at least two hours prior to the scheduled start of her shift if she needed to be absent. The employer allowed notice to be given via the designated absence reporting telephone number or via an online absence reporting application. Ms. Doremus was at all relevant times aware of the attendance policy and the absence reporting requirement. Under the employer's attendance policy, Ms. Doremus would be counted tardy only if she was late by 10 minutes or more.

The final absence that triggered the discharge occurred on Saturday, October 13, 2018. On October 11, Ms. Doremus traveled from Council Bluffs to Chicago for a family visit. At the time Ms. Doremus left for Chicago, she knew that she was scheduled to work a 9:15 a.m. to 5:30 p.m. shift on October 13. On the morning of October 12, Ms. Doremus and her family started their return trip to Council Bluffs. Ms. Doremus is able to drive, but was a passenger in the vehicle. At about 3:00 p.m. on October 12, the family's vehicle broke down near Davenport. At that point, the family was about a three-hour drive from Chicago and about a four and a half-

hour drive from Council Bluffs. Ms. Doremus and her family waited for roadside assistance from a family member. During that waiting period, Ms. Doremus notified Walmart that she would be absent from her October 13 shift. By 7:30 or 8:00 p.m., the vehicle was again operable. The driver and Ms. Doremus elected to spend the night in a hotel and to defer the remainder of their trip home to the next morning. Between 6:00 a.m. and 7:00 a.m. on October 13, Ms. Doremus called the Council Bluffs store to speak with the store manager, but the store manager was not at the store at that time. Ms. Doremus arrived back home in Council Bluffs before noon, but elected not to report for the remainder of her shift. Ms. Doremus returned to work on October 14 and continued to report for shifts until Ms. Andersen discharged her on October 21.

Ms. Anderson considered absences going back to May 3, 2018, when making the decision to discharge Ms. Doremus from the employment. Under the employer's attendance policy, an employee who exceeded nine attendance points during a rolling 180-day period was subject to discharge from the employment. Ms. Doremus was at all relevant times aware of this and aware of her accrued attendance points. On May 3, 12 and 31 and on June 7, Ms. Doremus left work early due to illness and properly notified a supervisor before she left. On May 7, 10, and 28 and on June 19, 21 and 27, Ms. Doremus was absent due to illness and properly notified the employer. On July 2, Ms. Doremus was late for work for personal reasons without notifying the employer that she would be late. The employer did not issue any reprimands to Ms. Doremus regarding her attendance. The employer has made a policy decision not to issue warnings regarding attendance.

#### **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 weight of the evidence in the record establishes a discharge on October 21, 2018 that was for no disqualifying reason. The final absence on October 13 was an unexcused absence under the applicable law. On that day, Ms. Doremus was absent for personal reasons. Ms. Doremus had elected to travel several hours away from home despite knowing that she was scheduled to work on the morning of October 13. Ms. Doremus and her adult travel companion could have continued on their journey to Council Bluffs on the evening of October 12, could have arrived home in time for Ms. Doremus to sleep and report for work the next morning, but elected instead

to defer their return home to the next day. The late arrival for personal reasons on July 2 was also an unexcused absence under the applicable law. The evidence fails to establish any other unexcused absences during the 180-day period the employer considered. Each of the remaining absences the employer considered were for illness and were properly reported to the employer. The employer failed to present sufficient evidence meet its burden of proving otherwise. The two unexcused absences, more than three months apart, are insufficient to establish excessive unexcused absences. Ms. Doremus is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

**DECISION:**

The November 26, 2018, reference 01, decision is reversed. The claimant was discharged on October 21, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs