IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHARMA NELSEN
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 11A-UI-03782-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/27/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 25, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 15, 2011. Claimant participated. Catherine Pafford, Assistant Manager, represented the employer.

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: Sharma Nelsen was employed by Wal-Mart as part-time greeter until March 1, 2011, when the employer discharged her for attendance. Toward the end of the employment, Ms. Nelsen worked just two days a week. Toward the end of the employment, the employer allowed Ms. Nelsen to choose the days she wanted to be placed on the schedule to work. Toward the end of the employment, Ms. Nelsen suffered from a depression diagnosis associated with the loss of her life-partner.

The employer's absence reporting policy required that Ms. Nelsen notify the employer at least two hours prior to her shift if she needed to be absent. But Ms. Nelsen generally contacted the employer 30 minutes prior to scheduled start of her shift if she needed to be absent. The final absence that prompted the discharge occurred on February 23, 2011, when Ms. Nelsen was absent due to illness and notified the employer 30 minutes prior to the shift. Ms. Nelsen was next scheduled to work on March 1, 2011 and the employer discharged her at that time.

The employer considered additional absences when making the decision to end Ms. Nelsen's employment. Ms. Nelsen was absent due to illness reported to the employer half an hour before her shift on September 9 and 19, November 1, December 30, 2010, and January 1, 4, 17, 18 and 25, 2011. On December 14, Ms. Nelsen had been absent because her uncle has just died and she wanted to attend a family gathering. But when Ms. Nelsen called the absence half an hour before her shift, she did not indicate this was the reason for the

absence. On February 3, 2011, Ms. Nelsen left work early with permission because she was concerned about road conditions.

The employer issued multiple reprimands to Ms. Nelsen for attendance. The reprimands progressed to a decision-making day in early February. Ms. Nelsen knew that her employment was in jeopardy well before the employer discharged her from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 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 individual shall be disqualified for benefits 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.

871 IAC 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.

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).

The weight of the evidence in the record establishes unexcused absences on September 9 and 19, November 1, and December 14 and 30, 2010, and January 1, 4, 17, 18 and 25, 2011, and February 23, 2011. For almost all of those days, Ms. Nelsen was absent due to illness, but failed to notify the employer until 30 minutes prior to her shift, rather than notifying the employer two hours prior per the policy. Ms. Nelsen's unexcused absences were excessive. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Nelsen was discharged for misconduct. Accordingly, Ms. Nelsen is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Nelsen.

DECISION:

The Agency representative's March 25, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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