

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI	
SCHAYALLA L HUSTED Claimant	APPEAL NO. 18A-UI-10825-JTT
WALMART INC Employer	ADMINISTRATIVE LAW JUDGE DECISION
	OC: 09/30/18 Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Schayalla Husted filed a timely appeal from the October 23, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the deputy's conclusion that Ms. Husted was discharged for repeated tardiness. After due notice was issued, a hearing was held on November 15, 2018. Ms. Husted participated. Natalie Segebart 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: Schayalla Husted was employed by Walmart, Inc. as a part-time Service Desk Associate from 2015 until October 4, 2018, when the employer discharged her for excessive tardiness. Ms. Husted was 10 or more minutes late for personal reasons on 11 occasions between August 12, 2018 and September 30, 2018. Ms. Husted had previously been late for personal reasons at least 11 other times during the final six months of the employment. Assistant Manager Natalie Segebart had verbally counseled Ms. Husted multiple times regarding the need to appear for work on time. At the start of September 2018, the employer learned that Ms. Husted had been altering her time card information in an attempt to prevent her tardiness from being counted against her. Ms. Husted was aware that the employer would only count her late if she was late by 10 minutes or more. With that in mind, Ms. Husted altered her time report for August 20, 21 and 22, 2018 and for 10 other dates to make it look like she had been only nine minutes late on each of the dates in question. On September 25, 2018, the employer issued a written reprimand for the time-card fraud. Ms. Husted was thereafter late for personal reasons two more times. Ms. Husted cites her need to share a vehicle with her parents as the basis for her habitual tardiness. Ms. Husted lived in Denison, two miles from the workplace.

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 misconduct in connection with the employment based on excessive unexcused tardiness and time-card fraud. Each of the late arrivals referenced in the findings of fact was due to matters of personal responsibility, primarily transportation, and therefore each was an unexcused absence under the applicable law. The 11 unexcused absences between August 12, 2018 and September 30, 2018 were more than sufficient to establish excessive unexcused absences. The pattern of habitual unexcused tardiness predated those final 11 late arrivals. To make matters worse, Ms. Husted attempted to deceive the employer and avail herself of consequences in connection with the habitual tardiness through time-card fraud. Ms. Husted's conduct demonstrated an ongoing willful and substantial disregard for the interests of the employer. Ms. Husted is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Husted must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The October 23, 2018, reference 01, decision is affirmed. The claimant was discharged on October 4, 2018 for misconduct in connection with the employment. 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 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/rvs