

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KAREN M TIPTON
Claimant

WALMART INC
Employer

APPEAL NO. 20A-UI-01082-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/05/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Karen Tipton filed a timely appeal from the January 31, 2020, 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. Tipton was discharged on January 7, 2020 for excessive unexcused absences. After due notice was issued, a hearing was held on February 20, 2020. Ms. Tipton participated. Shana Brown, People Lead, 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: Karen Tipton was employed by Walmart, Inc. as a Fresh Production Associate from March 2019 until January 7, 2020, when Lacy Sullivan, Assistant Manager, discharged her from the employment for exceeding the allowed number of attendance points. Though the employer characterized Ms. Tipton as a part-time employee, Ms. Tipton generally worked full-time or near full-time hours. If Ms. Tipton needed to be absent from a shift, the employer's attendance policy required that Ms. Tipton notify the employer at least an hour before the scheduled start of her shift. If Ms. Tipton needed to be late for a shift, the employer's policy required that she give notice as soon as possible. In both situations, the policy required that Ms. Tipton call a designated absence reporting hotline or give notice via a designated Walmart web page. If Ms. Tipton needed to leave work prior to the scheduled end of her shift, the policy required that Ms. Tipton speak with a manager prior to departing from the workplace. Under the policy, Ms. Tipton would be subject to discharge if she accumulated five attendance points in a rolling six-month period. At the time of discharge, the employer had documented 5.5 attendance points for the relevant period.

The final absence that factored in the discharge occurred on December 31, 2019, when Ms. Tipton was absent due to illness and properly reported the absence to the employer. The

next most recent absence occurred on December 29, 2019, when Ms. Tipton left work early due to illness and after speaking with a supervisor.

The employer considered earlier absences when making the decision to discharge Ms. Tipton from the employment. On August 28, 2019, Ms. Tipton left work early for personal reasons. Ms. Tipton had previously requested August 28, 29 and 30 off as vacation days. The employer denied that request. Ms. Tipton elected to leave work early on August 28 and did so under the belief that she was using PTO (protected time off) and that early departure would not result in attendance points. On September 17, 2019, Ms. Tipton's immediate supervisor contacted Ms. Tipton to have Ms. Tipton change her start time that day from 7:00 a.m. to 5:00 a.m. and her end of shift time from 4:00 p.m. to 1:00 p.m. Ms. Tipton worked the entire shift as amended by the supervisor. The employer erroneously documented an early departure on that day. On October 1, 2019, Ms. Tipton was absent due to illness and properly reported the absence to the employer. On October 23, 2019, Ms. Tipton was late for personal reasons. Ms. Tipton had made arrangements to start work at 1:00 p.m., rather than 8:00 a.m., so that she could accompany her boyfriend to a custody proceeding. Ms. Sullivan had approved the late start after the employer denied Ms. Tipton's request to have the entire shift off. Court adjourned at 12:45 p.m. and Ms. Tipton clocked in at 1:10 p.m. The employer provides a nine-minute grace period so that late arrivals are not counted in the attendance point system unless an employee is 10 minutes late. Ms. Tipton had not given notice that she would arrive later than the 1:00 p.m. agreed-upon amended start time. Ms. Tipton was again late for personal reasons on December 23, 2019, and clocked in 10 minutes after the scheduled start of her shift. Ms. Tipton had not given notice that she would be late, but spoke to Ms. Sullivan upon her arrival at the workplace.

The employer had not issued any reprimands to Ms. Tipton for attendance. Ms. Tipton could review her attendance points via an online attendance tracking system and did so toward the end of December and on January 6. On January 6, Ms. Tipton attempted to start the process of challenging some of her attendance point. Instead, the employer discharged her the next day.

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 a discharge for no disqualifying reason. The final absence on December 31, 2019 was due to illness, was properly reported to the employer, and therefore was an excused absence under the applicable law. The next most recent absence on December 29, 2019, was also due to illness, was properly reported to the employer, and therefore an excused absence under the applicable law. Because the final absence was an excused absence under the applicable law, it cannot serve as a basis for disqualifying Ms. Tipton for unemployment insurance benefits. Nor can the next most recent absence serve as a basis for disqualifying Ms. Tipton for benefits. The next most recent absence occurred on December 23, 2019 and was not a "current act" within the meaning of the law at the time of discharge. Because the evidence fails to establish a current act of misconduct, the discharge did not disqualify Ms. Tipton for unemployment insurance benefits. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider earlier absences. Ms. Tipton is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The January 31, 2020, reference 01, decision is reversed. The claimant was discharged on January 7, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn