

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**LACEY M RICARDES**  
Claimant

**APPEAL NO. 19A-UI-01138-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WALMART INC**  
Employer

**OC: 06/03/18**  
**Claimant: Appellant (2R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Administrative Code Rule 871-26.14(7) - Decision on the Record

**STATEMENT OF THE CASE:**

Lacey Ricardes filed a timely appeal from the February 5, 2019, reference 02, decision that held she was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Ms. Ricardes was discharged on January 16, 2019 for excessive unexcused absences. An appeal hearing was set for February 25, 2019 and the parties were appropriately notified of the appeal hearing. Ms. Ricardes did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. The employer also did not register a telephone number for the hearing. The employer provided written notice that it waived participation in the appeal hearing. The administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision based on the applicable law, the Agency administrative record of the employer's protest and the Agency administrative record of the February 1, 2019 fact-finding interview.

**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: Lacey Ricardes was employed by Walmart, Inc. as a full-time Personal Shopper from August 2018 until January 16, 2019, when Jana Ost diek, Assistant Manager, discharged her for attendance.

The employer has a written attendance policy that the employer reviewed with Ms. Ricardes at the start of her employment. If Ms. Ricardes needed to be absent from or late for work, the employer's attendance policy required that Ms. Ricardes call the designated absence reporting line at least one hour prior to the scheduled start of her shift. Ms. Ricardes could also give notice via the WalmartOne website, provided she gave the notice at least an hour prior to the scheduled start of the shift.

The final absence that triggered the discharge occurred on January 12, 2019. Ms. Ricardes reported the absence and selected “natural disaster” from the available options as the cause of the absence. The next most recent absence that factored in the discharge occurred on January 10, 2019, when Ms. Ricardes left work early due to a family emergency. Ms. Ricardes’ minor daughter had recently been diagnosed with a behavior disorder. On the morning of January 10, Ms. Ricardes received a telephone call at work from school authorities about the need to collect her daughter from school because the school could not manage her daughter’s behavior issues. Ms. Ricardes’ daughter had just been transitioned to a school that was to provide therapeutic services in connection with the behavior disorder. Ms. Ricardes provided proper notice to the employer prior to leaving work early. The employer considered several prior absences when making the decision to discharge Ms. Ricardes from the employment. The next most recent absence occurred on December 17, 2018.

### **REASONING AND CONCLUSIONS OF LAW:**

The Iowa Administrative Procedures Act at Iowa Code § 17A.12(3) provides in pertinent part:

If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. ... If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

Iowa Administrative Code rule 871-26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing by the scheduled starting time of the hearing or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provide in Iowa Code section 17A.12(3). The record may be reopened if the absent party makes a request to reopen the hearing in writing under subrule 26.8(3) and shows good cause for reopening the hearing.

- a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
- b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party.
- c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Iowa Administrative Code rule 871-26.8(4) provides:

(4) A request to reopen a record or vacate a decision must be made in writing. If necessary, the presiding officer may hear, ex parte, additional information regarding the request for reopening. The granting or denial of such a request may be used as grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

Upon review of the Agency's administrative file, the administrative law judge concluded it would be a miscarriage of justice to enter a default decision and concluded it was appropriate to enter a decision based on information contained in the Agency's administrative file.

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 employer had the burden of proof in this matter, but waived its participation in the appeal hearing. The employer presented no evidence at the appeal hearing to provide a disqualifying discharge. The weight of the evidence contained in the employer's protest and the fact-finding materials establishes a discharge for no disqualifying reason. In those filings, the employer presented evidence regarding a discharge triggered by an absence on January 12, 2019 for a “natural disaster.” The employer presented no evidence in connection with the protest or fact-finding interview to prove that Ms. Ricardes failed to properly report the absence or that the absence was based on a reason within Ms. Ricardes' control. Accordingly, the absence would be an excused absence under the applicable law. The evidence in the administrative file establishes that January 10, 2019 early departure was due to Ms. Ricardes' need to care for her minor child in connection with the child's bona fide illness. Ms. Ricardes properly notified the employer of her need to be absent. The absence would be an excused absence under the applicable law. The next most recent absence was on December 17, 2018 and was not a “current act” for unemployment insurance purposes. Because the evidence fails to establish a “current act” of misconduct, the discharge cannot serve as a basis for disqualifying Ms. Ricardes for unemployment insurance benefits. Ms. Ricardes is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

**DECISION:**

The February 5, 2019, reference 02, decision is reversed. The claimant was discharged on January 16, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work since she established the additional claim for benefits that was effective January 13, 2019.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs