IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEITH A SMALL
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 17A-UI-00986-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/25/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Keith Small filed a timely appeal from the January 17, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Small had been discharged on November 22, 2016 for violation of a known company rule. After due notice was issued, a hearing was held on February 16, 2017. Mr. Small participated. Jessi Myers, 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: Keith Small was employed by Wal-Mart as a full-time support manager at the Wal-Mart store in Grimes until November 22, 2016, when Assistant Managers Shaun Rees and Derek Davis discharged him for attendance. Mr. Small's usual work hours at the Grimes store were noon to 11:00 p.m., Saturday through Tuesday. Mr. Small had begun his employment with Wal-Mart in 2013. Effective April 1, 2016, Mr. Small transferred to the Grimes Wal-Mart and began his support manager duties. As a support manager, Mr. Small was responsible for assisting the assistant managers on the sales floor to make sure that work was properly delegated and completed. Mr. Small was an hourly employee. Mr. Small was expected to fill in as needed on the sales floor.

Pursuant to the employer's attendance policy, Mr. Small was required to call a designated absence reporting line to give notice of his need to be absent. The absence reporting line was an automated toll-free number. The automated answering system would prompt Mr. Small to provide his associate identification number, birthdate, Social Security number, and the reason for the absence. The answering system would log the information provided by Mr. Small and then automatically forward the call to the Grimes store so that Mr. Small could speak with a member of management. The employer preferred that Mr. Small speak with a member of

management regarding his need to be absent, but did not require such contact. The employer did not specify the time by which Mr. Small needed to provide notice of his need to be absent. The employer also had an absence reporting software application that Mr. Small could use to report his absences in lieu of using the toll free number. Once Mr. Small logged into the absence reporting system with his personal ID, the system would identify the shift in question and Mr. Small would just need to indicate whether he was going to be absent for the whole shift or just late for the shift. Pursuant to the attendance policy, Mr. Small was subject to being discharged from the employment if he accrued nine attendance points during a rolling six-month period. Mr. Small was familiar with the attendance policy, including absence reporting requirement.

The final absence that triggered the discharge occurred on November 19, 2016. On that day, Mr. Small was absent for his entire shift due to illness. Mr. Small had been suffering from an ear ache that took a turn for the worse on November 19. When Mr. Small awoke on November 19, he could not move without experiencing pain. Mr. Small used the absence reporting application to properly notify the employer that he would be absence from the shift that started at noon. Mr. Small was next scheduled to work on November 20 and appeared for that shift.

The next most recent absence that factored in the discharge occurred on November 13, 2017. On November 12, 2016, Mr. Small spoke to Mr. Rees regarding his desire to be absent for two and half hours on the evening November 13, 2016 so that he could attend a meeting in West Des Moines. The meeting was related to Mr. Small's plan to coach volleyball. On November 12, Mr. Rees gave Mr. Small permission to be absent for two and a half hours to attend the meeting on November 13. Mr. Small left the store between 6:15 and 6:30 p.m. Mr. Small did not return as expected to complete the rest of his shift after the meeting. Mr. Small's vehicle had become inoperable while Mr. Small was in West Des Moines. Mr. Small could have caught a ride back to work and could have left the truck issue for after his shift had ended. Mr. Small was concerned that his truck might be towed and decided to address the truck issue in lieu of returning to work. Mr. Small used the absence reporting application to give notice that he would be absent for the remainder of his shift.

On November 12, Mr. Small was late to work because he had extended the length of his visit to family in Waterloo to a point where he could not make it back to Grimes in time to report for work on time. Mr. Small used the absence reporting application between 10:00 a.m. and 11:00 a.m. to give notice that he would be arriving late for his noon shift.

On November 6, Mr. Small was late getting to work because he had stayed too long at church to be able to report for work on time. Mr. Small used the absence reporting application at 11:45 a.m. to give notice that he would be late for his noon shift.

On October 28, 2016, Mr. Small spoke with Mr. Reese to raise concern about being scheduled to work Saturday, October 29 and Sunday, October 30. Mr. Small had been on loan to the Windsor Heights Wal-Mart and had put in full-time hours at the Windsor Heights store during the period of Monday, October 24 through Friday, October 28, 2016. Mr. Small learned about the October 29 and 30 shifts a week and a half before the scheduled shifts. Mr. Small had requested that the eliminate those shifts in light of his work at the Windsor Heights store, but the employer initially declined to eliminate those hours. Mr. Small spoke with Mr. Rees about the matter on October 28. At that time, Mr. Rees agreed to eliminate the Saturday, October 29 shift. Mr. Small asked to report for work a little after 2:00 p.m. on October 30 so that he could attend church and run errands. Mr. Rees responded, "Fine. Okay." However, at the time of

November 22 discharge, Mr. Rees asserted that he had never actually *approved* Mr. Small's late arrival on October 30.

On July 16, Mr. Small was absent from his shift. The employer witness did not know the surrounding details. Mr. Small does not recall the surrounding details. Mr. Small was also late on May 31, June 12 and July 16, but the employer witness did not know the surrounding details. Mr. Small cannot recall the surrounding details.

On May 28, 2016, Mr. Small was late getting to work because he had traveled out of town and did not travel back to the Des Moines area soon enough to report for his shift on time. Neither Mr. Small nor the employer knows when or how notice was provided in connection with that absence.

The employer did not issue any reprimands to Mr. Small for attendance. Instead, the employer expected Mr. Small to monitor his attendance points.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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). 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 fails to establish a current act of misconduct because the final absence on November 19 that triggered the discharge was due to illness and was properly reported to the employer. Under the applicable law the absence was an excused absence and cannot serve as a basis for disqualifying Mr. Small for unemployment insurance benefits. The next most recent absence that factored in the discharge occurred on November 13, 2016, nine days prior to the discharge date. The employer had said nothing to Mr. Small prior to the discharge date to indicate that the November 13 absence placed his employment in jeopardy. Because the discharge was not based on a current act, the administrative law judge concludes that Mr. Small was discharged for no disqualifying reason. Accordingly, Mr. Small is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Small.

Because the discharge was not based on a current act of misconduct, the administrative law judge need not further consider the prior absences or whether they were excused or unexcused absences under the applicable law.

DECISION:

The January 17, 2017, reference 01, decision is reversed. The discharge was not based on a current act of misconduct. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs