

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LUKAS J BELL
Claimant

APPEAL NO. 18A-UI-12439-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 07/22/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Lukas Bell filed a timely appeal from the December 24, 2018, reference 03, decision that held he was disqualified for benefits and that the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on December 7, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on January 16, 2019. Mr. Bell did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Sherri Osbourne represented the employer. Exhibits A through I were received into evidence.

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: Lukas Bell was employed by Walmart, Inc. as a full-time Cap Team Associate 1 from 2015 until December 7, 2018, when Sherri Ogbourne, Co-Manager, discharged him from the employment for attendance. Mr. Bell worked at the Mason City Walmart. His shift started at 8:00 a.m. and usually ended between 4:00 p.m. and 5:00 p.m. If Mr. Bell needed to be absent from work, the employer's attendance policy required that he call the designated absence reporting line before the scheduled start of his shift and follow prompts providing by the automated answering system. Mr. Bell was at all relevant times aware of the absence reporting requirement and consistently complied with the absence reporting requirement in connection with his absence. Mr. Bell at all relevant times resided in Garner. Garner is in Hancock County. Mr. Bell commuted 20 to 30 minutes from Garner to Mason City for the employment.

The final absence that triggered the discharge was attributable to inclement weather. Before 6:00 a.m. that morning, Mr. Bell reviewed www.weather.com and saw that there was a winter storm warning in place until noon that day that included a warning that travel in the affected area would be "very hazardous or impossible." Mr. Bell also reviewed a list of weather-related closing at www.kimt.com, a website associated with a Mason City television station. Mr. Bell

concluded it was too dangerous to make the trip to Mason City for his shift and provided timely notice that he would be absent from the shift. After day break, Mr. Bell attempted to make the trip to work, quickly discerned that the roads he needed to travel were icy and unsafe, and returned home. Mr. Bell returned to work on his next work day and continued to report for his shifts until he was discharged on December 7, 2018.

Mr. Bell had also been absent due to inclement weather on December 1, 2018. Before 6:00 a.m. that morning, Mr. Bell reviewed a list of weather-related closings posted at www.kimt.com. Before 6:00 a.m. that morning, Mr. Bell also reviewed weather information at www.weather.com. The weather.com hourly weather prediction indicated there would be "occasional wintry mix for the next several hours" and that the weather conditions between 8:00 a.m. and 9:00 a.m. would include freezing rain. Mr. Bell concluded it was too dangerous to make the trip to Mason City for his shift and provided timely notice that he would be absent from the shift. Mr. Bell did not attempt the trip to work on December 1, 2018. At 9:22 a.m., Mr. Bell reviewed www.weather.com and saw that there was a winter storm warning in place until noon the following day that included a warning that travel in the affected area would be "very hazardous or impossible."

The employer considered earlier absences dating back to June 11, 2018 when making the decision to discharge Mr. Bell from the employment. All of those absences were illness-related and were properly reported to the employer. All but one of the absences, were due to Mr. Bell's personal illness. One absence was due to Mr. Bell's need to care for an ill teenager, who required Mr. Bell's assistance due to the illness.

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 no disqualifying reason. All of the absences the employer took into consideration were properly reported. All but the final two absences were due to illness. The final two absences were due to inclement weather under circumstances in which Mr. Bell reasonably concluded it was too dangerous to make the extended commute to the workplace. All of the absences the employer considered were

excused absences under the applicable law and, therefore, cannot serve as a basis for disqualifying Mr. Bell for unemployment insurance benefits. Mr. Bell is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The December 24, 2018, reference 03, decision is reversed. The claimant was discharged on December 7, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs