

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**DEMETRICE D TOMPKINS**  
Claimant

**APPEAL NO. 18A-UI-10078-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TRANSCO RAILWAY PRODUCTS INC**  
Employer

**OC: 09/16/18**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Demetrice Tompkins filed an appeal from the October 1, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Tompkins was discharged on September 14, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on October 22, 2018. Mr. Tompkins participated. The employer did not participate. The employer registered a telephone number for the hearing and named Jake Steil as the employer's representative. However, at the time of the hearing, Mr. Steil was not available at the number the employer registered for the hearing. Exhibits A, B and C were received into evidence.

**ISSUE:**

Whether Mr. Tompkins was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Demetrice Tompkins was employed by Transco Railway Products, Inc. as a full-time valve technician from December 2017 until September 14, 2018, when the employer discharged him for attendance. Mr. Tompkins' work hours during the last three months of the employment were 6:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Tompkins' supervisor was Lead Man Derek Smith. If Mr. Tompkins needed to be absent from work, the employer's policy required that he complete and submit a time-off request form at least 24 hours in advance of the absence. Under the employer's attendance policy, the employer deemed almost all absences unexcused regardless of the basis for the absence. The final absence that triggered the discharge occurred on September 9, 2018, when Mr. Tompkins arrived for work at 10:00 a.m. due to his need to appear for a 9:00 a.m. court-ordered periodic hearing regarding his parole status. Such hearings were scheduled every month or two. Prior to the employer moving Mr. Tompkins to the first shift, Mr. Tompkins had been able to report to the hearings without impacting work. Though Mr. Tompkins completed a timely time-off request form prior to the September 9 absence, the employer deemed the absence unexcused.

## 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. The employer did not participate in the hearing and did not present any evidence to meet its burden of proving, by a preponderance of the evidence, that the discharge was based on misconduct in connection with the employment. The employer presented no evidence to prove a discharge based on excessive unexcused absences. The evidence in the record establishes a discharge triggered by Mr. Tompkins' late arrival on September 9. The late arrival was based on Mr. Tompkins' obligation to appear for a periodic review of his parole status. Mr. Tompkins had no choice regarding whether to appear for the review hearing or the scheduling of the hearing. Mr. Tompkins made a timely time-off request. Under the circumstances, the September 9 absence cannot be deemed unexcused under the applicable law. Mr. Tompkins is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

**DECISION:**

The October 1, 2018, reference 01, decision is reversed. The claimant was discharged on September 14, 2018 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