

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRET A ADKINS**  
Claimant

**APPEAL NO. 16A-UI-11561-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VERMEER MANUFACTURING CO INC**  
Employer

**OC: 09/25/16**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Bret Adkins filed a timely appeal from the October 13, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Adkins was discharged on September 27, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on November 9, 2016. Mr. Adkins participated. Chelsea Septer represented the employer and presented additional testimony through Dee Wheeldon. Exhibits 1 through 5 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: Bret Adkins was employed by Vermeer Manufacturing Company, Inc., as a full-time assembler from June 2015 until September 27, 2016, when the employer discharged him for attendance. Mr. Adkins' immediate supervisor was Dee Wheeldon, Area Supervisor. Mr. Adkins' regular work hours were 6:00 a.m. to 2:30 or 3:30 p.m., Monday through Friday. Mr. Adkins was also required to perform occasional overtime work on Saturdays. If Mr. Adkins needed to be absent from work, the employer's attendance policy required that Mr. Adkins call Ms. Wheeldon at her work phone number prior to the scheduled start of the shift to notify her of the absence. The attendance policy, including the absence reporting policy, was contained in the handbook that employer provided to Mr. Adkins at the start of the employment. Mr. Adkins was aware of the attendance policy and the absence reporting requirement.

The final absence that triggered the discharge occurred on September 27, 2016. On that day, Mr. Adkins was 39 minutes late because he overslept. Mr. Adkins notified Ms. Wheeldon of the absence at 6:10 a.m. Mr. Adkins plug-in alarm clock had not sounded that morning because Mr. Adkins' home had lost power. Mr. Adkins had previously used his cell phone as an alarm clock, but had recently switched to using the plug in alarm. When Mr. Adkins started using the

plug-in alarm, he discontinued his use of the cell phone alarm clock feature. On August 31, 2016, Mr. Adkins was 25 minutes late for work because he had overslept. Mr. Adkins notified the employer prior to the start of the shift. On September 6, 2016, Mr. Adkins again overslept. When Mr. Adkins did not appear for work, Ms. Wheeldon telephoned Mr. Adkins. Mr. Adkins did not answer the call, but listened to the message and then provided late notice of his need to be absent due to illness.

The employer also considered Mr. Adkins' absences during the preceding 12 months in making the decision to discharge Mr. Adkins from the employment. On September 28, 2015, Mr. Adkins was absent due to a lack of sleep. Mr. Adkins had been up during the night with his newborn son who was less than a week old at the time. Mr. Adkins provided proper notice to the employer and the employer deemed the absence an excused absence. Mr. Adkins was absent due to illness on October 5, 2015, December 15, 2015 and January 11, 2016 with proper notice to the employer. On January 12, 2016, the employer issued a written reprimand to Mr. Adkins for attendance.

#### **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 establishes excessive unexcused absences based on the three absences between August 31 and September 27, 2016. The final absence on September 27, 2016 was an unexcused absence. That absence was attributable to Mr. Adkins oversleeping. It was Mr. Adkins' responsibility to make certain that he had a reliable alarm clock. That situation could have been easily solved by simply setting the alarms on the cell phone *and* the plug-in alarm clock. The absence on September 6, 2016 was also an unexcused absence. That absence again involved Mr. Adkins oversleeping. In connection with both absences, Mr. Adkins did not notify the employer of the need to miss work until after the scheduled start of the shift. The weight of the evidence establishes an additional unexcused absence on August 31, 2016, when Mr. Adkins was again late because he had overslept. The weight of the evidence does not support Mr. Adkins' assertion that he was late that day due to a transportation issue. Because it was Mr. Adkins' responsibility to ensure that he had a reliable source of transportation to get him to the workplace on time, a late arrival due to transportation issues

would also have been an unexcused absence under the applicable law. All but one of the earlier absences were due to illness, were properly reported to the employer and were excused absences under the applicable law. The employer excused the absence due to the need to care for the newborn during the overnight hours and, therefore, that absence was also an excused absence under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Adkins was discharged for misconduct. Accordingly, Mr. Adkins is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Adkins must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

**DECISION:**

The October 13, 2016, reference 01, decision is affirmed. The claimant was discharged on September 27, 2016 for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs