IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TADESSE T ZEGEYE
Claimant

TPI IOWA LLC
Employer

APPEAL NO. 14A-UI-13123-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/30/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Tadesse Zegeye filed a timely appeal from the December 12, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on January 16, 2015. Mr. Zegeye participated. Danielle Williams, Human Resources Coordinator, 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: Tadesse Zegeye was employed by TPI Iowa, L.L.C., as a full-time production worker from March 2013 until December 1, 2014, when Shift Supervisor Marty Brunsmann and Human Resources Generalist Taylor Johnston discharged him for attendance. Mr. Zegeye's regular work hours at the end of the employment were 7:00 a.m. to 3:00 p.m., Monday through Friday. Mr. Brunsmann was Mr. Zegeye's supervisor. Mr. Zegeye's work was also supervised by a team lead. Mr. Zegeye provided proper notice to employer in connection with each absence by leaving a message for his supervisor on the department's phone prior to the scheduled start of his shift.

The final absence that triggered the discharge occurred on November 17, 2014, when Mr. Zegeye was absent so that he could take a final exam for an online college class. Though Mr. Zegeye had to submit the test by 12:00 a.m. on November 17, 2014, he could actually do the exam work at any point on or before November 17, 2014. Mr. Zegeye had not requested the time off in advance. Mr. Zegeye had also missed work due to school or other personal reasons on December 15 and 16, 2013 and on May 18, May 27, September 15, November 3, November 4 and November 10, 2014. The employer issued a verbal warning for attendance in January 2014. The employer issued a written warning for attendance in June 2014.

On November 20, 2014, the employer issued a final reprimand to Mr. Zegeye for attendance. That reprimand was triggered by the absence on November 10, 2014 and did not include that absence that had just occurred on November 17. Mr. Zegeye knew on and before November 17, that his employment was in jeopardy due to his accrued attendance points.

The employer waited until December 1, 2014, to address the November 17, 2014 absence with Mr. Zegeye. Though the supervisor was aware of the absence on November 17, 2014, the employer's period review of attendance records did not occur until substantially later. After the absence on November 17, 2014, Mr. Zegeye had reported for work on November 18, 2014 and had continued to perform his regular duties until December 1, 2014.

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.

Each of the absences referenced in the findings of facts was an unexcused absence under the applicable law. Each involved a matter of personal responsibility. None was approved in advance. The unexcused absences were excessive, especially in the context of the multiple warnings for attendance.

The remaining question is whether the final absence that triggered the discharge constituted a current act for unemployment insurance purposes. The administrative law judge concludes that it did. Mr. Zegeye knew at the time of the November 17 absence and the November 20 reprimand that his employment was in jeopardy due to attendance. The time lapse between the November 17 absence and the December 1 meeting and discharge included the Thanksgiving holiday. Though there was delay, the administrative law judge concludes that the length of the delay was not unreasonable under the circumstances.

Mr. Zegeye's excessive unexcused absences constituted misconduct in connection the employment. Because Mr. Zegeye was discharged for misconduct, accordingly, he is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The December 12, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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