

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MAURICE F ROBINSON**  
Claimant

**APPEAL NO. 18A-UI-10570-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON PET PRODUCTS INC**  
Employer

**OC: 09/23/18**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Maurice Robinson filed a timely appeal from the October 19, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Robinson was discharged on September 5, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on November 7, 2018. Mr. Robinson participated. Dakota Cunningham represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-10571-JTT. Exhibits 1 through 11 and A were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to Mr. Robinson (DBRO).

**ISSUE:**

Whether Mr. Robinson 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: Maurice Robinson was employed by Tyson Pet Products, Inc. as a full-time Oven Assistant from February 2017 until September 6, 2018, when Brooke Salger, Human Resources Manager, discharged him for attendance. Mr. Robinson's usual scheduled work hours were 2:00 p.m. to 10:30 p.m., Monday through Friday. Mr. Robinson also performed weekend overtime work as needed. Production Supervisor Jonathan Paulson was Mr. Robinson's immediate supervisor. If Mr. Robinson needed to be absent or late for work, the employer's written attendance policy required that Mr. Robinson call the designated absence reporting number at least 30 minutes prior to the scheduled start of his shift and leave a message in response to the automated prompts. The employer reviewed the attendance policy with Mr. Robinson at the start of the employment and Mr. Robinson was familiar with the absence reporting requirement. The employer's attendance policy assigns attendance points to all but a narrow group of absences. The employer assigns attendance points to absences due to illness even when they are properly reported to the employer.

The final absence that triggered the discharge occurred on August 31, 2018. On that day, Mr. Robinson reported late for work. Mr. Robinson passed through the turnstile at the entrance of the workplace at 2:07 p.m. and clocked in at 2:07 p.m. The employer allows employees a five-minute clock-in grace period at the start of the shift. In other words, the employer would not deem Mr. Robinson late for his 2:00 p.m. shift unless he clocked in after 2:05 p.m. After Mr. Robinson clocked in, he was arrested by an awaiting police officer on a non-work related charge. Mr. Robinson reported for work the next day, but his supervisor sent him home and directed him to contact the human resources manager on September 4, 2018. Mr. Robinson did not contact the human resources manager on September 4. Instead, Mr. Robinson called in absent on September 4 and 5 due to illness. Both absences were properly reported. The employer did not consider the September 4 or 5 absences in the discharge decision. On September 6, 2018, the employer notified Mr. Robinson that he was discharged for attendance.

In making the decision to discharge Mr. Robinson, the employer considered prior absences dating back to October 9, 2017. Those prior absences included several absences that were due to illness and properly reported to the employer. However, there were other types of absences as well. On November 20, 2017, Mr. Robinson's absence was due to a bona fide family emergency and properly reported to the employer. On June 1, 2018, Mr. Robinson reported to work almost two hours late for personal reasons. On June 10, 2018, Mr. Robinson was on the schedule to work at 6:00 a.m. after clocking out at 10:29 p.m. the previous evening. Mr. Robinson was under the belief that he had to be off the clock for a set number of hours between shifts. The employer had no such policy. Mr. Robinson contacted his supervisor at 6:18 a.m. and they discussed how soon Mr. Robinson could and should report for work. Mr. Robinson then reported for work and clocked in at 6:40 a.m. On July 21, 2018, Mr. Robinson was late for work due to a lack of transportation. The co-worker with whom Mr. Robinson usually caught a ride did not work that day and Mr. Robinson had to wait for his father to become available to give him a ride to the workplace. The employer issued written notices to Mr. Robinson as he incurred attendance points and had him sign these notices.

#### **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, if the employee 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 weight of the evidence in the record establishes a discharge for misconduct in connection with the employment based on excessive unexcused absences. The discharge decision was triggered by the August 31, 2018 late arrival. The weight of the evidence, including the documented time when Mr. Robinson passed through the entrance turnstile, establishes that Mr. Robinson was indeed late for work that day for personal reasons. The absence was an unexcused absence under the applicable law. The next most recent unexcused absence occurred on July 21, 2018, when Mr. Robinson was again late for work. On that day, the late arrival was due to transportation issues, a matter of personal responsibility. The weight of the evidence does not establish an unexcused absence on June 10, 2018. The weight of the evidence establishes a bona fide misunderstanding on that day regarding how soon Mr. Robinson could report for a morning shift after working a late night shift. The evidence establishes an additional unexcused absence on June 1, 2018, when Mr. Robinson was late for work for personal reasons. Each of these unexcused absences occurred in the context of attendance point accrual notices that were effectively warnings regarding attendance. The unexcused absences on June 1, July 21, and August 31 were excessive. The absences due to illness were properly reported to the employer and, therefore, were excused absences under the applicable law. The November 2017 absence due to the family emergency was properly reported to the employer and was an excused absence under the applicable law. Based on the excessive unexcused absences, Mr. Robinson 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. Robinson must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

**DECISION:**

The October 19, 2018, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment. 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 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

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