IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBBIN D SWAILS
Claimant

HOBBY LOBBY STORES INC GEN PTNR
HOB-LOB LIMITED PARTNERSHIP
Employer

APPEAL NO. 06A-UI-11230-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/15/06 R: 03
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Hobby Lobby filed a timely appeal from the November 8, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was commenced on December 6, 2006 and completed on December 21, 2006. Store Manager John Mercil represented the employer. Claimant Robbin Swails participated. Employer's Exhibits One through Five were received into evidence. The administrative law judge took official notice of the Agency's administrative records regarding benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether the claimant was discharged for on excessive unexcused absences.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robbin Swails was employed as a full-time Needlework Department Head at the Coralville Hobby Lobby store from March 15, 2005 until October 10, 2006, when Store Manager John Mercil discharged her for attendance.

The employer has an attendance policy set for forth in an employee handbook. Under the policy, an employee is required to "call his/her supervisor before or within 30 minutes of the beginning of his/her workday, and explain the reason for the tardy or absence." Under the policy, "Supervisors may request a physician's statement for any illness related absences beyond 2 or more consecutive days."

The final absence that prompted the discharge occurred on October 9, when Ms. Swails was absent due to illness properly reported to the employer. On October 7, Ms. Swails had left work early with Mr. Mercil's approval due to illness. Before Ms. Swails left on October 7, Mr. Mercil

issued a reprimand to Ms. Swails regarding an absence on October 2 and warned Ms. Mercil that future absences could result in discharge from the employment. A short while after Ms. Swails left work on October 7, Ms. Swails telephoned Mr. Mercil and requested to change her October 9 shift from 9:00 a.m. – 5:00 p.m. to 1:00 p.m. to close. During the phone call, Ms. Swails indicated she was concerned about losing her job if she was absent due to illness on October 9. Ms. Swails expected she would continue to be ill on October 9 and thought she would be more likely to make it to work if she had a later start time. Mr. Mercil approved the October 9 shift change. On October 9, Ms. Swails contacted Mr. Mercil sometime between 11:00 a.m. and noon to indicate she was still sick and would be absent for her 1:00 p.m. shift. Mr. Mercil discharged Ms. Swails when she appeared for work the next day.

Mr. Mercil had concluded that Ms. Swails had a pattern of being absent the Monday following a Friday payday. Mr. Mercil suspected that several of the absences Ms. Swails reported as being based on illness were not in fact based on illness. In March, Ms. Swails had been absent due to an alleged back injury. Ms. Swails does have ongoing back issues relating to fall in 2002. In March 2006, when Ms. Mercil called in sick a second day due to her back, Mr. Mercil asked whether she would be seeing a doctor. Ms. Swails indicated she would be seeing her chiropractor. Ms. Swails subsequently advised Mr. Mercil that her chiropractor had been on vacation and she had not been able to see the chiropractor. Despite the employer's belief that some of Ms. Swails prior absences may not in fact have been due to illness, nothing occurred in connection with the absence on October 9 to indicate that the absence was based on anything other than bona fide illness.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Swails was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 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.

871 IAC 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.

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).

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 Ms. Swails' absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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).

The evidence in the record establishes that the October 9 final absence that prompted the discharge was for bona fide illness properly reported to the employer. Because the final absence was an excused absence under the applicable law, the evidence fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Swails for benefits. See 871 IAC 24.32(8). Because there was no "current act" of misconduct, disqualifying misconduct cannot be established and it is unnecessary for the administrative law judge to consider the prior absences. See 871 IAC 24.32(8). Though the decision to discharge Ms. Swails was within the discretion of the employer, the administrative law judge concludes that Ms. Swails was discharged for no disqualifying reason. Accordingly, Ms. Swails is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Swails.

DECISION:

The Agency representative's November 8, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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/kjw