IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 06A-UI-07168-JTT
OC: 06/04/06 R: 03
Claimant: Appellant (2R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

TALX UC EXPRESS
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Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Lynne Robinson filed a timely appeal from the July 10, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 3, 2006. Ms. Robinson participated personally and was represented by Attorney Mike McEnroe. David Williams of TALX UC eXpress represented Hy-Vee and presented testimony through Store Director Wade Charlstrom, Ryan Rannigen and Brenda Everts. The administrative law judge took official notice of the Agency's administrative file, including documents submitted for the fact-finding interview. Claimant's Exhibits A and B were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lynne Robinson was employed by Hy-Vee on a full-time basis from August 2, 2005 until June 7, 2006, when Store Director Wade Charlstrom discharged her for excessive absences. Prior to April 26, 2006, Ms. Robinson had worked as an overnight clerk in the Hy-Vee gas station. On April 26, Store Director Wade Charlstrom notified Ms. Robinson that she would be transferred to an overnight stocking position, due to a history of absences and the need for consistent overnight coverage at the gas station. The employer's written attendance policy required Ms. Robinson to personally notify her supervisor before the scheduled start of her shift if she needed to be absent from work. The policy was set forth in the employee handbook and Ms. Robinson had signed her acknowledgment of receipt of the handbook. Ms. Robinson's immediate supervisor in the overnight stocking position was Overnight Stock Manager Lowell Potter or Assistant Overnight Stock Manager Ryan Rannigen. The final absences that prompted the discharge occurred on June 1, 2, 4, 5 and 6.

During her overnight shift on May 20 - 21, Ms. Robinson suffered a work place injury to her lower back. Ms. Robinson reported the injury to Assistant Manager Greg Mick. Mr. Mick did not complete a worker's compensation first report of injury form in connection with the injury. Instead, Mr. Mick asked Ms. Robinson if she was really hurt and Ms. Robinson indicated she was. Mr. Mick asked Ms. Robinson if she wanted to go home due to the injury and Ms. Robinson indicated she did. Ms. Robinson left work at 12:30 a.m. on May 21. Prior to the start of her shift on May 21, Ms. Robinson notified Mr. Rannigan she would be absent due to illness. Ms. Robinson was not scheduled to work on May 22 or 23. Prior to the start of her shift on May 24, Ms. Robinson notified Mr. Rannigan that she would again be absent due to illness and was going to see the doctor the next day. On May 25, Ms. Robinson did in fact see her doctor, Ellen Sakornbut, M.D. Dr. Sakornbut diagnosed Ms. Robinson with vertebrogenic pain syndrome NOS and prescribed pain medication. The doctor executed a medical release and Physician's Aide Kelly Frein faxed the medical excuse to Hy-Vee. The medical excuse indicated as follows:

> This individual was treated at the Family Health Center on May 25, 2006. She was seen for an on-the-job injury to her lower back sustained on May 21, 2006. She may be able to return to work on May 27 at light duty, but it is likely she will take longer to recover. I have reminded her that we are glad to take care of Workman's Comp paperwork. If any questions arise, please contact me.

Ms. Robinson had stood by as the physician's aide faxed the medical excuse to Hy-Vee. Hy-Vee received the document. Within a few minutes of the fax transmission, Ms. Robinson received a call from Hy-Vee employee Brenda Everts. Ms. Everts told Ms. Robinson that Ms. Robinson should have been seen by, and would need to be seen by, the employer's designated Worker's Compensation doctor for the workplace injury and that Hy-Vee would not reimburse Ms. Robinson for the trip to her doctor. Ms. Robinson expressed willingness to see the employer's designated doctor that day. On May 26, Ms. Robinson was examined by Physician's Assistant J. Haag at Covenant Heath System. P.A. Haag diagnosed Ms. Robinson with lower lumbar strain with spasm. P.A. Haag released Ms. Robinson for restricted duty effective May 26, 2006. The restrictions included a five-pound lifting limit, restricted bending, twisting and reaching, and alternating standing, sitting and walking as needed. P.A. Haag also prescribed three medications. After the appointment, Ms. Robinson took a copy of the medical release to Hy-Vee. Ms. Everts was not there, so Ms. Robinson left the release form with the second shift manager, Todd, and asked him to have Ms. Everts call her. Ms. Robinson notified her supervisor prior to the start of her shift that her back still hurt and she would be absent for her shift. No one at Hy-Vee had discussed a light-duty assignment with Ms. Robinson up to this

point. On May 27, Ms. Robinson returned to work pursuant to the medical release executed by her doctor. Ms. Robinson appeared for her shifts on May 28 and 29.

Ms. Robinson's next scheduled shift was on June 1. On June 1, Ms. Robinson notified Mr. Rannigan prior to the start of her shift that she was throwing up and would be absent from work. Ms. Robinson had taken all three of her medications and thought that was what had made her ill. Ms. Robinson erroneously believed she had June 2 off and was a "no-call/no-show" for her shift that day. Ms. Robinson did have June 3 off. On June 4, Ms. Robinson was still in bed sick. Ms. Robinson's daughter came to her house that afternoon to care for her. Ms. Robinson's daughter called Hy-Vee at approximately 3:00 p.m. to notify the employer that Ms. Robinson would be absent from her 10:00 p.m. shift. Ms. Robinson's daughter spoke with an employee named Becky and asked Becky to have one of the overnight stock managers contact Ms. Robinson. Ms. Robinson's daughter then dialed Ms. Robinson's doctor and handed the telephone to Ms. Robinson.

On June 5, Ms. Robinson's daughter drove her to Dr. Sakornbut's office. Ms. Robinson was too ill to drive. Dr. Sakornbut diagnosed Ms. Robinson with "enteritis, viral NOS" and excused Ms. Robinson from work until June 7. The doctor executed a medical release and Physician's Aide Kelly Frein faxed the medical excuse to Hy-Vee. The claimant provided an Affidavit from Ms. Frein, in which Affidavit Ms. Frein indicates that she faxed the excuse to Hy-Vee and stood by fax machine until in indicated a successful transmission. The medical excuse indicated as follows:

> This individual was treated at the Family Health Center on June 5, 2006. She has been absent from work due to acute illness and may return to light duty on June 7, 2006. She is already under restriction from Occupational Health because of a back injury. If any questions arise, please contact me.

Ms. Robinson had no reason to believe the fax to Hy-Vee had not been received by Hy-Vee. Ms. Robinson did not follow up and call Hy-Vee to ensure the employer had received the fax and did not further notify the employer regarding her absences on June 5 and 6.

Ms. Robinson returned to Hy-Vee on light duty status on June 7. On June 8, Store Director Wade Charlstrom telephoned Ms. Robinson and discharged her from the employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Robinson was discharged for misconduct in connection with the employment based on excessive unexcused absences. 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 Ms. Robinson's 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 indicates that Ms. Robinson's absences during the period of May 21 through May 26 were for illness properly reported to the employer and, therefore, excused absences.

The greater weight of the evidence in the record establishes that Ms. Robinson's absence on June 1 was an excused absence. The administrative law judge finds Ms. Robinson's assertion that she notified Mr. Rannigen prior the start of her shift credible and Mr. Rannigen was unable to assert whether or not he received such a call. The burden of proof was on the employer to establish an unexcused absence.

The evidence establishes that Ms. Robinson's absence on June 2 was an unexcused absence. Ms. Robinson erroneously concluded that she had the day off and failed to contact the employer.

The evidence establishes that Ms. Robinson's absence on June 4 should be deemed an excused absence. The absence was due to illness. Ms. Robinson was physically unable to make the call. Ms. Robinson's daughter notified the employer of the absence and requested a return phone call from an overnight stock supervisor. Under the circumstances, Ms. Robinson's failure to personally notify her supervisor of the absence was not a deliberate, intentional or culpable act. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence establishes that Ms. Robinson's absences on June 5 and 6 were unexcused absences. The evidence indicates that Ms. Robinson made a good faith effort to notify the employer by means of the fax sent from her doctor's office. However, the doctor's notes indicate that Ms. Robinson only appeared mildly ill. Though the doctor provided a diagnosis, the evidence does not support a conclusion that Ms. Robinson was too sick to properly notify the employer of her absence.

Thus, the evidence in the record indicates three unexcused absences on June 2, 5 and 6. Although the Administrative file contains notes the overnight stock managers or the gas station supervisor kept regarding absences prior to May 20, the employer did not present additional evidence regarding specific absences prior to May 20 and the administrative law judge concludes that the notes do not present proof by a preponderance of the evidence of unexcused absences. Although the absences on June 5 and 6 were unexcused under the applicable law, the administrative law judge cannot disregard the context in which they occurred or the good faith effort to notify the employer of the absences demonstrated by the attempted fax transmission from the doctor's office. The administrative law judge concludes that Ms. Robinson's unexcused absences were not excessive. Accordingly, Ms. Robinson was discharged for no disqualifying reason. Ms. Robinson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Robinson.

The evidence presented at the hearing raised the question of whether Ms. Robinson has been able and available for work since establishing her claim for benefits, as required by Iowa Code section 96.4(3). This matter will be remanded to a claims representative to address that issue.

DECISION:

The Agency representative's July 10, 2006, reference 01, decision is reversed. 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.

REMAND:

This matter is remanded for determination of whether the claimant has been able and available for employment since establishing her claim for benefits.

jt/cs