IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DIANNA M BAKER
Claimant

SECURITAS SECURITY SERVICES USA INC
Employer

APPEAL NO: 06A-UI-08320-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/16/06 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:

Securitas Security Services USA filed a timely appeal from the August 8, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 5, 2006. Claimant Dianna Baker participated. Malia Maples of Talx Employer Services represented the employer and presented testimony through supervisor John Sturbaum. Exhibits One through Six were received into evidence.

ISSUE:

Whether Ms. Baker was discharged for misconduct based on excessive unexcused absences and, therefore, is disqualified for unemployment insurance benefits. The administrative law judge concludes the unexcused absences were not excessive.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dianna Baker was employed by Securitas Security Services as a full-time security guard from November 21, 2005 until May 24, 2006, when Administrative Specialist Jessica Henry discharged her for attendance. The final absence that prompted the discharge occurred on May 24, 2006. On that date, Ms. Baker notified the Securitas receptionist at 1:04 p.m. that she would be late for her shift that was scheduled to start at 2:00 p.m. Ms. Baker indicated she had a family emergency. Ms. Baker arrived at work at 2:38 p.m. Ms. Baker's aunt had suffered a heart attack the previous evening. Ms. Baker was late on May 24 because she was transporting her mother to visit the hospitalized aunt.

The employer has a written attendance policy. On September 27, 2005, Ms. Baker signed her acknowledgment of the policy. The written policy indicates that a tardy with notice and without notice will result in different attendance points being incurred by the employee. However the attendance policy does not indicate a specific time by which an employee is to notify the employer he or she will be tardy. The written policy indicates that an employee who will be

absent from a shift must call and speak directly with a supervisor at least four hours prior to the scheduled start of the shift. Employees who are unable to appear for a shift are also allowed to find a substitute to cover the shift in order to avoid incurring attendance points.

For purposes of determining whether an employee's absences are excessive and/or to impose discipline, the employer tracks an employee's absences over a rolling three-month period. After three months of the absence, the employer deletes information regarding the date of the absence. On March 21, 2006, Ms. Baker notified the employer at 12:05 p.m. that she would be absent for her 2:00 p.m. shift because she needed to take her child to the emergency room. The child had a 104 degree temperature and Ms. Baker had attempted to lower the temperature earlier in the day without success. Ms. Baker had also attempted, without success, to find someone to cover her shift. On March 23, Ms. Baker was seven minutes late in getting to her assigned post. Ms. Baker was aware that she was expected to be at her post at the scheduled start of her shift, but was tardy for personal reasons. On April 18, Ms. Baker notified the employer more than four hours prior to her shift that she would be absent because she needed to consult with an attorney. In mid-December 2005, Ms. Baker was tardy because she had to take her daughter to the doctor and provided proper notice to the employer. In November 2005, Ms. Baker had been absent because she needed to go to the hospital, but notified the employer within four hours before her shift was to begin.

The employer issued attendance warnings to Ms. Baker on March 22, 2006, March 23, and April 19.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Baker 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.

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. Baker'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 in the record establishes Ms. Baker's tardiness on May 24, 2006 was unexcused. The tardiness was not based on a medical emergency, but instead, was based on Ms. Baker's decision to transport her mother to visit her aunt in the hospital. In addition, Ms. Baker failed to notify the employer at least four hours prior to her shift and spoke with a receptionist instead of speaking directly with a supervisor. Ms. Baker's absence on March 21 was an excused absence. Though Ms. Baker notified the employer less than four hours prior to the start of her shift, her child's temperature and the need to transport the child to the emergency room

constituted a medical emergency that justified the short notice to the employer. Ms. Baker's tardiness on March 23 was an unexcused absence. Ms. Baker's absence on April 18, so that she could consult an attorney, was an unexcused absence under the applicable law. The employer provided insufficient evidence to establish any unexcused absences, prior to March 2006. The administrative law judge concludes that Ms. Baker's tardiness on March 23, her absence on April 18, and her tardiness on May 24 occurred sufficiently far apart and were sufficiently few in number so as not to constitute excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Baker was discharged for no disqualifying reason. Accordingly, Ms. Baker is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Baker.

DECISION:

The Agency representatives August 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

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