BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

COLEEN L DOTY	:	
	:	**HEARING NUMBER:** 11B-UI-02442
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
ALEGENT HEALTH	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 24.32(7)

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Coleen Doty (Claimant) worked for Alegent Health (Employer), most recently as a medical reception specialist, from September 19, 1990 until she was fired on January 20, 2011. (Tran at p. 3-4; p. 10-11). Under the Employer's policy, employees are discharged once they accumulate ten attendance points. (Tran at p. 5; Ex. 4). The points drop off a year after they are assessed. (Ex. 4, p. 4). Five points are assessed for a no-call/no-show. (Tran at p. 5; Ex. 4).

On March 22, 2010 the Claimant received a written counseling based on six attendance points. (Tran at p. 4; p. 7; Ex. 1). A final written warning for attendance was issued to her on April 14, 2010, when she had 8 attendance points. (Tran at p. 4-5; p. 11; Ex. 1).

The Claimant applied for intermittent leave under the Family Medical Leave Act (FMLA) on June 4, 2010. (Tran at p. 8; p. 17; p. 18; Ex. 3). She was approved for intermittent leave under FMLA. (Tran at p. 8-9; p. 14; p. 17; Ex. 3). All the absences approved under FMLA were excused, except for two which the Employer found not be have been requested in time. (Tran at p. 8-9; Ex. 3). The Claimant took her mother to the hospital on March 16 and March 24. (Tran at p. 14).

In February and March 2010 the Claimant was absent multiple times for medical reasons. (Tran at p. 11; p. 13-16; p. 17; Ex. 2; Ex. A). The Claimant did provide a medical excuse dated May 4, 2010 covering those absences but the Employer did not excuse these absences. (Tran at p. 15; Ex. A).

On January 15, 2011 the Claimant the Claimant was no call/now show. (Tran at p. 4). There were two different rotating Saturday schedules and the Claimant was unaware that she was on the schedule that day. (Tran at p. 12-13; p. 14). This absence brought the Claimant over her allotted points, and the Employer terminated the Claimant for the stated reason of absenteeism. (Tran at p. 4; Ex. 1).

REASONING AND CONCLUSIONS OF LAW:

Legal Standards:

Iowa Code Section 96.5(2)(a) (2011) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

In the specific context of absenteeism the administrative code provides:

> Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)…accurately states the law").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187, 192 (Iowa 1984). Second the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds", *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not "properly reported". *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982)(excused absences are those "with appropriate notice"). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused for reasonable grounds. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984). The determination of whether an absence is unexcused because not based on reasonable grounds does not turn on requirements imposed by the employer. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). For example, an employer may not deem an absence unexcused because the employee fails to produce a physician's excuse. *Id.*

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. *Higgins v. IDJS*, 350 N.W.2d 187, 190 (Iowa 1984).

As noted, the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. In consonance with this, the law provides:

> *Past acts of misconduct*. While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985).

Application of Standards:

We have reviewed the absences here in some detail. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's testimony that the absences that caused her March and April warnings were, with only two exceptions, based on her ongoing medical condition. One exception was for dental problems which might not be excused for FMLA, but certainly is for unemployment purposes. The second was for taking the Claimant's mother to the hospital, which we find to be for reasonable grounds. As for proper reporting the Claimant described symptoms which explain the instances of late reporting of absences based on this condition. Improperly or late reported absences will be deemed excused absences if the employee's failure to timely report the absence was due to incapacity or to the illness itself. *See Roberts v. Iowa Dept. of Job Services*, 356 N.W.2d 218 (Iowa 1984); *Floyd v. IDJS*, 338 N.W.2d 536 (Iowa App. 1983). Here the late calls are explained by the illness. This would leave only one no call/no call proven by the Employer. This single absence – even if it were unexcused – would not be excessive and misconduct is not shown.

Even counting the other absences against the Claimant still we would not find misconduct. The greater weight of the evidence supports the conclusion that the Claimant honestly thought that she was not scheduled to work on the 15th. This understanding was the result of changes in scheduling. (Tran at p. 12). It is true that the Claimant should have checked the computer schedule, and that her years of experience caused her to make a wrong assumption. The Claimant's mistake was an honest good faith error. The Claimant will not be disqualified if the Employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). Where the Employer proves only that the Claimant honestly believed she was not scheduled to work no act of misconduct is shown. The fact of the Claimant's prior attendance issues does not raise this honest error to the level of misconduct. The discharge was thus not caused by misconduct and is therefore not disqualifying even counting the unexcused absences the same way as the Employer. See *generally, West v. Employment Appeal Board*, 489 N.W.2d 731, 734 (Iowa 1992)("must be a direct causal relation between the misconduct and the discharge"); *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant).

DECISION:

The administrative law judge's decision dated April 1, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

RRA/fnv