



the interim the Claimant suffered a relapse. (Tran at p. 7; p. 8-9; p. 10). The Claimant, as a result of this relapse, did not contact the Employer as she had promised, nor did she return the FMLA paperwork as asked. (Tran at p. 3; p. 4; p. 9; p 10-11). At hearing, the Claimant did not recall receiving the FMLA paperwork. (Tran at p. 6-7; p. 8). The Employer discharged the Claimant on December 19, 2008 for the stated reason of unexcused absenteeism. (Tran at p. 2; p. 5).

## REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2009) 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).

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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). 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. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Unreported absences will be deemed excused absences if the employee’s failure to report the absence was due to incapacity. See Roberts v. Iowa Dept. of Job Services, 356 N.W.2d 218 (Iowa 1984).

Application of Standards: We have often cited Lee for its teachings on our Employment Security Law:

The definition of “misconduct” in the administrative code focuses on whether the employee’s conduct was deliberate, intentional, or culpable. Kelly v. Iowa Dep’t of Job Serv., 386 N.W.2d 552, 554 (Iowa App.1986); see also Savage v. Employment Appeal Bd., 529 N.W.2d 640, 642 (Iowa App.1995) (noting that misconduct is a deliberate act or omission which requires a showing of a deliberate intention or culpable act by the employee); Roberts v. Iowa Dep’t of Job Serv., 356 N.W.2d 218, 222 (Iowa 1984) (noting that misconduct connotes volition). Therefore, whether misconduct has occurred requires proof that the employee acted intentionally; a showing of mere negligence is not enough to constitute misconduct.

Lee at 665-66. As a corollary to this the Court has recognized that unsatisfactory performance linked to mental lapses caused by medical conditions will not constitute misconduct. Quenot v. Iowa Department

of Job Service, 339 N.W.2d 624, 627 (Iowa App. 1983); Roberts v. IDJS, 356 N.W.2d 218, 222 (Iowa 1984). The Roberts case is particularly applicable as the Supreme Court made clear there that an inability to call in an absence that is caused by a medical condition would not be disqualifying misconduct. Roberts v. IDJS, 356 N.W.2d 218, 222 (Iowa 1984)(failure to report absence based on inability). Here the evidence supports that the Claimant was exactly in this situation. She ceased her medication because

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of her mental condition (a not uncommon occurrence) and this worsened her situation. She then was unable to respond to the Employer's quite reasonable requirements in the customary fashion. This inability to appear or to report her absence was a direct result of her involuntary mental state and thus not intentional. Under Roberts the failure to report is excused and the Claimant is not disqualified based on misconduct.

#### **DECISION:**

The administrative law judge's decision dated February 23, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. 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 Kuester

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (medical information, statement) were reviewed, the

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Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique Kuester

RRA/kjo