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

JESUS M RODRIGUEZ

Claimant,

and

ROSENBOOM MACHINE & TOOL INC

Employer.

HEARING NUMBER: 08B-UI-01665

EMPLOYMENT APPEAL BOARD
DECISION

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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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: Jesus started working for the Rosenboom Machine and Tool (Employer) on June 1, 2004. (Tran at p. 8; p. 38). He worked full time as a night shift cylinder line operator in the employer's hydraulic cylinder manufacturing business. (Tran at p. 9; p. 38). He normally worked from 4:00 p.m. to 6:00 a.m., Monday through Thursday. (Tran at p. 9; p. 38). His last day of work was November 19, 2007. (Tran at p. 8; p. 38). On November 20 Jesus called in sick to the employer. (Tran at p. 10; p. 39). There was no work scheduled for November 21 through November 25, and the claimant had previously arranged to be off on November 26. (Tran at p. 10-11). Under the Employer's policy employees absent for three successive work days without securing an unpaid leave of absence, or otherwise obtaining approval, are deemed to have quit. (Tran at p. 31-32; p. 36; Ex. 1).

On November 26 or November 27 Jesus and his brother, Jose, who also worked for the employer,

received a call from family in Mexico indicating that their father had suffered a stroke and was in the

hospital. (Tran at p. 39; p. 55; p. 57). Shortly thereafter they left together to drive to Mexico. (Tran at p. 39). Jesus called the employer to report that they were on their way to Mexico due to their father's medical emergency. (Tran at p. 11-12; p. 39). Jesus spoke with Craig VanDrunen, human resources generalist. (Tran at p. 11-12). Mr. VanDrunen explained to Jesus that the absence due to their father's medical emergency could be covered under the Family Medical Leave Act up to three months, but that the employer would need to obtain documentation. (Tran at p. 12; p. 13). Mr. Van Drunen and Jesus had follow-up conversations to the same effect on about December 3 and on about December 7. (Tran at p. 12-13; p. 40; p. 55; p. 64; p. 68). The December 7 call was to Mexico. (Tran at p. 65). Mr. Duren spoke briefly with Jose on December 3, but primarily spoke with Jesus because he was more bilingual than Jose. (Tran at p. 14; p. 58). Jesus understood that there was an approved period of leave and that medical documentation would need to be provided. (Tran at p. 13; p. 41). During their conversations Jesus never indicated that he did not understand Mr. VanDrunen's directions. (Tran at p. 21). The credible evidence supports the conclusion that Jesus, and through him Jose, understood that documentation needed to be supplied to the Employer by the given deadline. (Tran at p. 13; p. 14; p. 19; p. 20; p. 35; p. 58; p. 65-66).

Mr. VanDrunen was expecting Jesus or Jose to by December 10 provide either a mailing address or a fax number to which the paperwork could be sent so it could be completed by a doctor and returned. (Tran at p. 13; p. 14; p. 65-66). No address or fax number was provided by then so the Employer sent the Claimant a letter dated December 12 enclosing the documents and indicating that the completed form must be returned by December 31. (Tran at p. 14-15; p. 27-28; p. 53 [no contact]; Ex. 4). The letter was mailed by certified mail to the claimant's Spirit Lake, Iowa address. (Tran at p. 14-15; p. 16; Ex. 5). From there it was forwarded to the claimant's sister-in-law's (or half-sister) address in McAllen, Texas, and was signed for by her on December 20. (Tran at p. 16; p. 30; p. 44; Ex. 5). The claimant was still in Mexico with his father at that time, and did not actually receive the letter until he returned to McAllen on or about January 22, 2008. (Tran at p. 44; p. 48; p. 60).

When the employer did not receive the paperwork or other response from the claimant by December 31, it sent an another letter dated January 7, 2008, again to the claimant's Spirit Lake, Iowa address, indicating that since the paperwork had not been completed and returned and there had been no other communication, the employer deemed the claimant's absence from work to be unexcused, and that his employment was therefore ended. (Tran at p. 16; p. 17; p. 36; p. 45; Ex. 4)

REASONING AND CONCLUSIONS OF LAW: Viewed either as a quit or as a termination the Claimant is disqualified for benefits.

Termination Analysis: Iowa Code Section 96.5(2)(a) (2007) 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).

There is no doubt that the Claimant had excessive absences. These absences do appear to be for reasonable grounds. The problem for the Claimant is that they are not properly reported. If the Claimant's failure to report could be excused then the Claimant would not be disqualified. Roberts v. IDJS, 356 N.W.2d 218, 222 (Iowa 1984)(failure to report absence based on inability). The credible evidence, however, establishes that the Claimant knew that he was expected to supply documentation by the dates specified by the Employer. The mere fact that the Claimant was seeking extended leave does not relieve him of his obligations to report and substantiate his need for continued absence. Nor does the fact that the Claimant didn't reasonably arrange to have his mail handled while he was absent. Thus the continued failure to report means that the Claimant's very considerable absences were not properly reported. The Claimant engaged in conduct that was a "disregard of standards of behavior which the employer has the right to expect of employees." 871 IAC 24.32(1)(a).

Quit Analysis: Iowa Code Section 96.5(1) states:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Administrative Code 871–24.25 further provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

More specifically, the rules of the Department address the situation of no call/ no show:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
> …
> (4) The claimant was absent for three days without giving notice to employer in

violation of company rule.

871 IAC 24.25(4).

The rule in question deems the Claimant's actions to be a quit regardless of subjective intent. While the rule states that quitting, "in general", requires an intention to quit and that therefore subjective intent governs, no general rule can address the myriad situations that arise in the thousands of unemployment compensation claims filed each year. This is why the rule qualifies the introductory statement by describing voluntary quits with "in general". The rule goes on to state that in particular a person who has a three day no-call/no-show in violation of the employer's rules will be deemed to have voluntarily quit. This deviation from the general rule is based on the idea that a claimant's forlorn hope that he can keep his job even when he doesn't come to work does not govern the award of benefits. C.f. Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988)(objective standard for good faith in misconduct cases). In the usual case a voluntary quit requires a subjective intent on the part of the employee to terminate the employment. FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). Job abandonment is not the usual case. This is a case where the reality of the employee's actions in failing to come to work and his subjective hopes of keeping his job are at odds. The rule does not more than make a choice between the two: when the objective actions of an employee belie their expressed subjective intent then the objective act will govern. Thus job abandonment is a well-recognized form of quitting employment where the employee does not expressly state that they quit. E.g. Mississippi Employment Sec. Com'n v. Danner 867 So.2d 1050, 1053 (Miss.App.,2004); Turner v. Labor and Indus. Relations Com'n 793 S.W.2d 191, 195 (Mo.App. W.D. 1990); Com. Department of Labor & Industry, Office of Employment Sec. v. Com. Unemployment Compensation Bd. of Review, 501 A.2d 297, 299 (Pa. Cmwlth. 1985); Ristick v. Employment Division, 640 P.2d 696 (Or. App. 1982).

The Claimant's failure to respond as directed by the Employer is very similar to that of the claimant in Reelfes v. EAB, (Iowa App. 6/27/2007). In Reelfes the claimant suffered from mental health issues. She requested leave and then was required by her employer to provide medical documentation while on leave. She did not promptly handle her mail and did not supply the documentation as requested. The Court of Appeals upheld the Board's disqualification because "[e]vidence at the hearing indicated Reelfs was absent for more than three consecutive work days without proper notification and authorization. This is presumed to be a quit without good cause." Slip op. at 7. Exactly the same can be said of the Claimant in this case. We have found that he knew of the requirement, that he failed to properly arrange for handling of his mail while away, and that he was absent for an extended period without supplying the required documentation. Common sense dictates that an employer can rightfully demand *some* documentation of the reasons for and expected duration of an extended absence as part of a no call/no show policy. The Claimant was absent for three consecutive days without giving notice and like the claimaint in Reelfes is deemed to have quit without good cause.

DECISION:

The administrative law judge's decision dated April 15, 2008 is **REVERSED**. The Employment Appeal Board concludes that the claimant was separated from employment in a manner that disqualifies the Claimant from benefits until such time the Claimant has worked in and was paid wages for insured

work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code §96.5(1)(g); §96.5(2)(a).

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Elizabeth L. Sieser

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Monique F. Kuester

RRA/ss

DISSENTING OPINION OF JOHN A. PENO :

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. 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). In Gaborit the employer was not allowed to deem an absence unexcused because the employee failed to produce a physician's excuse. Id. The Employer here seeks to deem the absence "not properly reported" or a "no call" for the same reason. If this is allowed the holding of Gaborit is made a null. The lesson of Gaborit is that a claimaint may not be disqualified merely for failure to provide a doctor's excuse for absences that are otherwise excused under our law – and this is so whether analyzed under the "reasonable grounds" or under the "properly report" rubric.

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John A. Peno

RRA/ss