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

RAYMOND D BRINK	:	
	:	HEARING NUMBER: 09B-UI-04334
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
ABCO ENGINEERING CORP	:	
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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Raymond Brink (Claimant) worked as a full time welder for ABCO Engineering, Corporation (Employer) from March 17, 2007 until the date of his discharge in November, 2008. (Tran at p. 2; p. 7; p. 8). He was discharged because of his attendance. (Tran at p. 2). The majority of the time that the Claimant missed work he either simply failed to call in, or called in and left a message on the answering machine without speaking personally with anyone. (Tran at p. 2-3; p. 7). This was contrary to the Employer's policies. (Tran at p. 2; p. 5; p. 14).

The Claimant had been given verbal and written warnings that he must contact the Employer if he was not coming in. (Tran at p. 2-3; p. 5; p. 6; p. 7). The Claimant missed 41 days of work since June 6, 2008. (Tran at p. 3). In October of 2008, the Claimant took a part-time job with Dairy Queen. (Tran at

p. 4; p. 8).

The Claimant was absent because of an appointment with his lawyer on August 22. (Tran at p. 10). He was absent on September 22 because his sister was in jail. (Tran at p. 11). The Employer learned that on at least one occasion when the Claimant claimed to be sick he was in fact working at Dairy Queen. (Tran at p. 5; p. 9).

The Employer told the Claimant's girlfriend that he was fired. (Tran at p. 4). The Claimant was fired because he had missed 41 days of work since June 6, 2008 and because he worked elsewhere when calling in sick to the Employer. (Tran at p. 2; p. 3; p. 5).

REASONING AND CONCLUSIONS OF LAW:

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:
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> 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 record shows that the Claimant repeatedly failed to properly report his absences. The Employer has proved that the Claimant was expected to speak with someone when he was absent and that the Claimant knew it. Moreover, the Claimant's testimony that he worked as a cook on at least one day when he was supposedly sick exacerbates his conduct. Sallis v. Employment Appeal Bd. 437 N.W.2d 895, 897 (Iowa 1989)(dishonesty regarding absences is exacerbating factor). Given the large number of absences, the Claimant's dishonesty and the Claimant's habitual disregard of the call-in procedure, we find that misconduct has been proven.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative, the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the

decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question.

DECISION:

The administrative law judge's decision dated June 24, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv