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

SHERRY STONER Claimant, and NEWTON CARE LLC Employer.	:	HEARING NUMBER: 08B-UI-02866 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 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. 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:

The claimant was employed as a temporary full-time certified nurse's aide from March 23, 2007 through February 12, 2008. (Tran at p. 3; p. 18). The employer's policy provides that employees are terminated at nine absences within a 12-month period. (Ex. 1). Under the Employer's policy absences are to be reported three hours prior to the start of the employee's shift. (Ex. 1). The policy also states that, "Failure to report for two (2) or more consecutive scheduled workdays will be considered one 'absence,' however, as with all absences, the Company may require medical certification or other appropriate documentation to substantiate the reason for the absence." (Ex. 1 see also Tran. at p. 11). The policy makes no distinction among causes for absences. (Tran at p. 7). The Claimant was terminated for having 9 days of absence since June 14, 2007. (Tran at p. 3; p. 18; Ex 2).

The Claimant's final absences occurred on February 10, 2008 and February 11, 2008. (Ex. 2). She was absent those days because her daughter-in-law was in labor and the Claimant was her only means of transportation. (Tran at p. 4; p. 19-20; Ex. 2). Actually, as it turned out, the daughter-in-law was dehydrated and not in labor. (Tran at p. 24). She had been having a problem pregnancy. (Tran at p. 24-25). The Claimant called in on time on these days. (Tran at p. 6).

A prior absence occurred on June 14, 2007, when the Claimant was absent because her granddaughter was sick and kept her up all night. (Ex. 2) On October 4, 2007, the Claimant reported that she would not be in but called in about a half hour prior to the beginning of her shift. (Tran at p. 14; Ex. 2) The Claimant was absent that day due to a work-related injury. (Tran at p. 18). The Claimant missed work on November 5 and November 8, 2007, due to family issues. (Ex. 2). On December 28, 2007 she was absent because her mother-in-law was in the hospital. (Ex. 2). The claimant missed January 4, 2008 due to illness. (Tran at p. 18; p. 23-34; Ex. A). She did not report this absence since she actually did come into work but was sent home by the Employer. (Tran at p. 18; p. 19; p. 24; p. 27; Ex. A). On February 8, 2008 the Claimant was absent due to her son's medical emergency. (Tran at p. 9; Ex. 2). She called in on time for this absence. (Tran at p. 9).

Concerning the final absences the Claimant did not think her job was in jeopardy because she did not think she had nine absences. (Tran at p. 8-9; p. 25). She did not think her absence due to illness on January 4, 2008 was counted. (Tran at p. 18). Additionally, the claimant read the absenteeism policy to provide that absences for two or more consecutive workdays will be counted as one absence. (Tran at p. 8-9; p. 18). Consequently, she counted her final two days as one absence, but the employer determined otherwise. (Tran at p. 5; p. 8-9; p. 18).

In summary

Date	Total Absences As Counted by Employer	Reported	Reason
6/14/07	1	Yes	Sick granddaughter
10/4/07	2	½ hour prior	Work injury
11/5/07	3	Yes	Family issues
11/8/07	4	Yes	Family issues
12/28/07	5	Yes	Mother-in-law hospital
1/4/08	6	Came to work	Sick – sent home
2/8/08	7	Yes	Son medical emergency
2/10/2008	8	Yes	Daughter-in-law labor
2/11/2008	9	Yes	Daughter-in-law labor

(Ex. 2). As a result of her absences the Claimant received an oral warning concerning her November 5 absence and a written warning concerning her December 28 absence. (Tran at p. 4; p. 7; Ex 2; Ex. 3). She received a written warning on February 12, 2008 concerning her absence on February 8. (Tran at p. 5; Ex. 2). She was then terminated that same day for her absences on February 10-11. (Ex. 2).

REASONING AND CONCLUSIONS OF LAW:

Standards in Absenteeism Cases: 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). 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.

Application of Standards: Where an employer counts against an employee's attendance record incidents that are not "unexcused" under the Employment Security Law the question is whether the termination would have occurred had those incidents not been held against the employee. If not, then the termination is caused by an absence that is not misconduct and the Claimant would be eligible for benefits.

Generally in deciding what level of absenteeism is excessive the policy of the Employer is a useful starting point. If a Claimant's number of absences does not exceed the Employer's own tolerance for absences, that number would not ordinarily be an excessive level of absence. Meanwhile, the fact that a Claimant exceeds the absences allowed by the Employer's policy, while important to our analysis, does not definitively establish that the number of absences is excessive. This is because if we were to treat an employer's policy as controlling then even an employer who, Scrooge-like, allows only a single day a year could avoid paying benefits. Thus, generally, absences that do not exceed the employer's own policy would not be excessive while absences that do exceed the employer's policy may be excessive depending upon the reasonableness of the employer's policy.

Looking over the Claimant's record we see at least three of her absences that are excused and properly reported. There are others that are arguable for the Claimant, most notably her absence for a workplace injury, but given the three more clear-cut cases we have no need to address close questions.

The first and, frankly, glaringly obvious excused absence is the absence on January 4, 2008. The Claimant was sick and this is specifically listed in the rule as an example of reasonable grounds for

absence. 871 IAC 24.32(7). The absence was properly reported because it was the Employer who determined that the Claimant should go home. Removing this absence from the calculus leaves the Claimant with only 8 absences. Even without any further analysis this means the Employer has only shown 8 days worth of "unexcused" absences and under the Employer's policy, and under our reading of the law, this is not an excessive level of absences. This alone means the Claimant would not be disqualified.

The second absence that appears excused is the February 8, 2008 absence. It is agreed by all that the Claimant took her son to the hospital for possible surgery and that this absence was properly reported. This situation, on its face, appears to be one of reasonable grounds as it is more than just a run of the mill illness of a family member. It is possible, under the right facts, that this would not be excused. But the Employer has failed to prove any detail concerning the incident. Given the facial reasonableness of the grounds for absence the Employer failed to prove this absence was "unexcused" under the law.

Finally, the absence of February 10 and February 11 also appears to be excused as for reasonable grounds and properly reported. Again there is no question the absences were properly reported. There remains only whether the situation described by the Claimant is reasonable grounds for her absence. With her daughter-in-law having a problem pregnancy, with her being dehydrated, with no one but the Claimant being able to drive, and with lives possibly at stake we do not think the Employer proved that this absence was not for reasonable grounds.

Even if we were to find the February 10 and 11 absences to be unexcused we would not find the Claimant had committed misconduct by being absent these two days. Given the wording of the Employer's policy the Claimant reasonably thought that the two days, related by the same serious causes, would count as one. The Claimant made an error but it was no more than a good faith error in judgment. Counting the two days as one, the Claimant would not be in excess of the Employer's policy and for this reason as well we find that the Employer failed to prove that the Claimant had excessive unexcused absences.

The Employer has failed, in several different ways, to prove by preponderance that the Claimant committed disqualifying misconduct. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Benefits accordingly are allowed.

DECISION:

The administrative law judge's decision dated April 14, 2008 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.

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John A. Peno

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Elizabeth L. Seiser

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Monique Kuester

RRA/fnv