



## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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).

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)(emphasis added); *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.*

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.W.2d 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).

Looking to the Claimant’s absence our focus is on the final four absences. The regulations specifically list illness as reasonable grounds for absence. Thus the final four absences are all for reasonable grounds as a matter of law. *E.g. Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa App. 2007).

More critically here is the question of whether the absences were “properly reported.” The case of *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007) makes clear that it is the law, not an employer, who determines if an absence is for “reasonable grounds.” We do not think this applies with full force to “properly reporting” an absence, however. The issue of proper reporting varies from employer to employer depending on business need. Thus, as a general matter, we measure proper reporting against the employer’s policy. Here while the Employer stated that the policy was to speak personally with Mr. Osterhout, we have found that other employees did not necessarily do this. In the past the Claimant had failed to call at all, and was warned to speak with Mr. Osterhout. This would not necessarily put him on notice that talking to Bob would *still* be insufficient. Under these circumstances we conclude that the Claimant made only a good faith error of judgment by relying on Bob, who after all did tell Osterhout. Thus, in effect, we have a Claimant discharged for making good faith errors that are not normally disqualifying. Under the unique circumstances of the case, we find that the good faith mistake in calling in means that the Claimant did not fail to properly report the absence. This is bolstered by the fact that Osterhout knew the Claimant was absent because Bob did in fact tell Osterhout. *See Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536, 538 (Iowa App., 1983) (“His employer knew that he was ill, and had fair warning that petitioner might be absent for an extended period of time due to that illness.”). Again, we do not excuse failure to comply with call-in policy in cases where employees simply fail to familiarize

themselves with policy, or choose to ignore policy, or just don't care. Here the Claimant did care but made a good faith error in believing there was enough flexibility in the policy to allow him to go through Bob, the service manager answerable to Osterhout. This is not disqualifying misconduct.

**DECISION:**

The administrative law judge's decision dated October 7, 2013 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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Cloyd (Robby) Robinson

**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