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

MELISSA A KIMBLE

Claimant,

and

B K TILE INC

Employer.

HEARING NUMBER: 09B-UI-10928

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 employer 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:

The Claimant worked full time for the Employer as an office worker from August 1, 2007, to October 6, 2008. (Tran at p. 3). She was scheduled to work from 9:00 a.m. to 5:00 p.m. on weekdays and some occasional Saturdays. (Tran at p. 3). The Claimant was informed and understood that under the Employer's work rules, regular attendance was required and employees were required to notify the Employer within the first hour if they were not able to work as scheduled. (Tran at p. 4; Ex. 3).

On February 18, 2008, the Claimant was verbally warned about repeated unexcused absences after she was absent due to her illness on January 4 and 7, absent due to her children's illness on January 24 and 25, and absent due to winter snow and ice on February 6 and 18. (Tran at p. 7; p. 15; Ex. 2).

On August 29, the Claimant received a written warning because she had been absent two more days in February, three days in March, two days in April, two days in May, two days in June, four days in July, and two days in August. (Tran at p. 8; Ex. 1; Ex. 3). The absences were due to her illness, her children's illness, and her husband's illness and were properly reported. (Ex. 1). She was warned that under the Employer's policy, an absence due to illness without a doctor's excuse or vacation time to cover the absence was unexcused. (Ex. 3).

The Claimant was absent from work due to her child being sick on September 17-19 and 23. (Ex. 1). She was sick and unable to work on September 25 and 26. (Ex. 1). She properly notified the Employer regarding these absences. (Tran at p. 16).

From October 7 through 10, 2008, the Claimant and her three children were sick with the stomach flu. (Tran at p. 13). She notified her supervisor, Shannon Frost, about her absences by text message. (Tran at p. 9; p. 13). The Claimant was scheduled to work on Saturday, October 11. (Tran at p. 4). The Claimant's mother was to babysit the children on Saturday since her husband was also scheduled to work. (Tran at p. 20-21). On Thursday, the Claimant determined that her mother was not mentally stable and she needed to find someone else to watch her children. (Tran at p. 13). On Thursday, she notified Frost about the situation with her mother, and stated she was trying to find a babysitter but was not sure she would be able to work on Saturday. (Tran at p. 9; p. 13).

As of Friday, the Claimant had not found a babysitter for her children. (Tran at p. 9). She notified Frost that she had not been able to find a babysitter for her children on Saturday. (Tran at p. 13). She asked Frost to see if another employee would switch Saturdays with her. (Tran at p. 13). Frost contacted other employees, but no one was able to work for the Claimant. (Tran at p. 9). Frost then informed the Claimant that she needed to report to work on Saturday because her job was on the line. (Tran at p. 3; p. 9; p. 14). The Claimant continued to look for a babysitter but informed Frost on Friday evening that she was unsuccessful in finding a babysitter for Saturday. (Tran at p. 13-14). On Saturday morning, the Claimant text-messaged the Employer that she was unable to work. (Tran at p. 10; p. 13-14). The Claimant's two-year old son was also still ill that morning. (Tran at p. 20).

REASONING AND CONCLUSIONS OF LAW:

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:
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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).

This last rule, that areas of personal responsibility are not considered reasonable grounds, is one key to our decision. The other is the Claimant's very considerable history of absences.

The Claimant was absent a total of 35 times in 2008. (Ex. 1). Of these she was personally sick at most 16 times and no excuse is recorded for 7 times. Two of those absences with no excuse were due to weather. Even excusing the weather absences (which could be called a transportation issue) this leaves a dozen unexcused absences in a nine month period. This is certainly excessive. While we understand that sick children demand attention fundamentally it was the Claimant's responsibility to arrange for childcare. Higgins v. IDJS, 350 N.W.2d 187, 191 (Iowa 1984). It was only when the Claimant knew that her child was already sick and that would be fired if she did not make it to work that the Claimant made any such attempt. Only then did she learn that her choice, her mother, was not suitable. Yet as early as April the Claimant was missing work due to sick children and had already received a warning to "make more of an effort to come to work." (Ex. 2). By August 29 – five weeks before the onset of the final illness – the Claimant was on written warning for attendance. The Claimant had plenty of notice that she needed to find day care for her children when they got sick. Indeed under our law it was her responsibility to do so. Children get sick. The Claimant knew this, knew she was on discipline for attendance, did nothing to cover for when a child gets sick. Under the circumstances of this case the Employer has proven that the Claimant engaged in misconduct by her excessive unexcused absences in the face of discipline for attendance.

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.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (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 December 15, 2008 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct 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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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv

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.

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John A. Peno

RRA/fnv