**IOWA WORKFORCE DEVELOPMENT**
**Unemployment Insurance Appeals Section**
**1000 East Grand—Des Moines, Iowa 50319**
**DECISION OF THE ADMINISTRATIVE LAW JUDGE**
68-0157 (7-97) – 3091078 - EI

**ANTONIA M REYNOLDS**
**2906 DES MOINES ST**
**DES MOINES IA 50317**

**THE CBE GROUP INC**
**PO BOX 900**
**WATERLOO IA 50701-0900**

**Appeal Number: 04A-UI-05603-RT**
**OC: 04-18-04 R: 02**
**Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.4-3 - Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Antonia M. Reynolds, filed a timely appeal from an unemployment insurance decision dated May 12, 2004, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on June 10, 2004 with the claimant participating. Paula Reynolds, the claimant's mother, testified for the claimant. Kim Passick, Director of Operations, and Ryan Farley, Financial Supervisor, participated in the hearing for the employer, The CBE Group, Inc. Mary Phillips, Senior Vice President of Human Resources, was available to testify for the employer but not called because her testimony would have been

repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time collector from November 10, 2003 until she separated from her employment on or about April 22, 2004. On April 21, 2004, the claimant had to leave work early because she broke a tooth. She had permission from the employer to do so but the employer did talk to the claimant about her attendance. On April 22, 2004, the claimant was absent from work because of a family emergency involving her son. Because of the emergency nature of the problem, the claimant could not call the employer so the claimant's mother did. The claimant's mother called the employer and spoke to someone and told that person that the claimant would not be at work because of a family emergency. The person with whom the mother spoke told the mother that the claimant need not bother to come to work, that she did not have a job. The mother relayed this to the claimant and the claimant believed that she was discharged and was absent thereafter. The employer has a policy in its handbook for which the employees have access on the computer and for which the claimant signed an acknowledgement providing that two consecutive absences as a no-call/no-show is considered a termination but the employer allows the employees usually one additional day before terminating them. The employer also requires that an employee call in and report an absence to the employee's supervisor or to management one-half hour before the start of that employee's shift. On April 22, 2004, the claimant's mother called in in a timely fashion. On April 30, 2004, the claimant came in to get her last check and the employer's witness, Kim Passick, Director of Operations, asked the claimant why she had quit. The claimant did not mention the family emergency because she felt it was of a personal nature and was not necessary to explain to the employer at that time. The employer attempted to rehire the claimant but the claimant did not meet the employer's new background check requirements and the claimant was not rehired.

The claimant received good reviews except for her attendance. The claimant was tardy on January 30, 2004 because one of her minor children was ill. The claimant is a single mother with several children. The claimant's son called the employer before the claimant's start time of the tardy. The claimant received a verbal warning for this tardy. On March 12, 2004, the claimant received another verbal warning for her attendance when she was absent for one full day and two half days because of personal illness. These were properly reported to the employer. The claimant was to have been given a written warning on April 22, 2004 for her attendance but it was never given to the claimant because she was absent that day because of the family emergency. The written warning was for three tardies on April 6, April 12, and April 14, 2004. The claimant was tardy on those three occasions because of difficulties with her minor children. The claimant had a number of matters going on concerning her children during this period of time. The claimant never expressed any concerns to the employer about her working conditions nor did she ever indicate or announce an intention to quit if any of her concerns were not addressed by the employer. After separating from the employer herein, the claimant has placed no restrictions on her ability to work and has placed restrictions on her availability for work for day time work preferring not to work at night because of her children. The claimant is earnestly and actively seeking work by making two in-person contacts each week.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5-1 provides:

> 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 Code Section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a, (7) provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 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 definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (7) 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.

The crucial issue here is the character of the separation. The claimant maintains that she was discharged when someone at the employer told the claimant's mother that she did not need to

bother coming into work, that she had no job. The employer maintains that the claimant voluntarily quit when she failed to show up for work without notifying the employer on April 22, April 23, and April 26, 2004. The resolution of this issue is close. The administrative law judge concludes that the employer has the burden of proof to establish the character of the separation and the administrative law judge further concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The testimony of the claimant and the employer's main witness, Kim Passick, Director of Operations, is remarkably similar concerning their own personal knowledge. It is the testimony of the claimant's mother and the employer's witness, Ryan Farley, Financial Supervisor, that are at odds. The claimant's mother, Paula Reynolds, credibly testified that the claimant had a family emergency on April 22, 2004 that prevented the claimant from going to work and because of the emergency the claimant could not call the employer. The claimant's mother further credibly testified that she called the employer and spoke to someone who told her that the claimant should not bother coming to work, that she did not have a job. The claimant's mother passed this on to the claimant and the claimant believed that she was discharged. The claimant's mother testified that she believed that she spoke to "Ryan." The employer's minor witness, Ryan Farley, Financial Supervisor, adamantly denies speaking to the claimant's mother. His denial is also credible. The administrative law judge is constrained to conclude here that the claimant's mother called the employer and spoke to someone, perhaps not Mr. Farley, who did tell the claimant's mother that the claimant need not bother to come in to work, that she did not have a job. The employer could offer no evidence that such a conversation did not occur with someone other than Mr. Farley. The claimant credibly testified that the employer was strictly enforcing its attendance policy and that she had been warned the previous day about her attendance when she left work early for a broken tooth. The evidence also establishes that the claimant had received two verbal warnings for her attendance and was to receive a written warning had the claimant shown up for work on or after April 22, 2004. All of this seems to confirm that the employer may well have told the claimant's mother that the claimant was discharged for the absence on April 22, 2004. It is true that the employer attempted to rehire the claimant and this certainly does not appear to have been a discharge but also does not answer the question as to whether the claimant's mother was told by someone that the claimant did not have a job. Accordingly, although it is a close question, the administrative law judge concludes that the claimant did not voluntarily leave her employment but was discharged.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant credibly testified that she had a good review except for her attendance and therefore had not been discharged for any other reason. This is confirmed by the willingness of the employer's main witness, Kim Passick, Director of Operations, to rehire the claimant. There is a history of some absences for the claimant. The claimant was absent on April 22, 2004 but as noted above this absence was for a family emergency and was properly reported to the employer. The claimant left work early on April 21, 2004 for personal illness or injury when she broke a tooth and apparently the claimant had informed the employer of this because she was

warned about her attendance. There is also evidence that the claimant was late coming to work on January 30, 2004 but this was because of the illness of a child. The administrative law judge concludes that this tardy was properly reported. Ms. Passick testified that the claimant's boyfriend called in at 8:00 a.m. but the claimant testified it was her son and he called before 8:00 a.m. The claimant would be in a better position to know who and when the call was made. For this tardy the claimant received a verbal warning. The claimant also received a verbal warning on or about March 12, 2004 for one full day of absence and two half days of absence. These were for personal illness. Even Ms. Passick concedes that claimant was absent for illness so the claimant must have reported these absences. There is also evidence that the claimant was tardy on three days in April, April 6, April 12, and April 14, 2004. The claimant testified that she was tardy on those days because of difficulties with her children. The claimant testified credibly that she was having a lot of problems and a lot going on with her children and it caused her to be late. The claimant had also used some hours of her personal time off but apparently this was with the permission of the employer and did not count against the claimant's attendance. The claimant was going to get a written warning for the three tardies in April but never received it because she was discharged on the day so was to have been warned.

The administrative law judge concludes that all of claimant's absences and tardies were for reasonable cause or personal illness and properly reported and are not excessive unexcused absenteeism. The administrative law judge further notes that the claimant really only received two verbal warnings for her attendance with a potential third verbal warning on April 21, 2004 but had received no written warnings.

Accordingly, although it is a close question, for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). Although it is a close question, the administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code Section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead vs. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that the claimant is able, available, and earnestly and actively seeking work. The claimant credibly testified that she has placed no restrictions on her ability to work. The claimant further testified that she had placed no restrictions on her availability for work except that she was seeking daytime work. The administrative law judge does not believe that this restriction unreasonably impedes the claimant's opportunity to obtain employment. The claimant also credibly testified that she is earnestly and actively seeking work and making two in-person job contacts each week. There was no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits.

DECISION:

The representative's decision of May 12, 2004, reference 02, is reversed. The claimant, Antonia M. Reynolds, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. The claimant is able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits for this reason.

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