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

TODD E JOHNSON Claimant, and DOLGENCORP LLC Employer.	:	HEARING NUMBER: 09B-UI-08977 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: 96.5-1

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. 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:

Todd Johnson (Claimant) worked as a full-time store manager for Dollar General (Employer) since January 2008. (Tran at p. 1-2). His last day on the job was April 30, 2009. (Tran at p. 1; p. 16). He is allowed to take off work, without specifically notifying his superiors each day, assuming that he has the time and that he has arranged for an assistant manager to cover. (Tran at p. 2). The Claimant's supervisor was district manager Mike Williams. (Tran at p. 1; p. 16).

In November 2008 the Claimant was hospitalized and missed over a month of work because of a heart attack. (Tran at p. 7). On May 1st, 2009 the Claimant was feeling as if he had a flu. (Tran at p. 6-7). The Claimant understood that a flu sometimes can share symptoms with a heart attack. (Tran at p. 7).

The Claimant was advised by his physician to stay home and rest. (Tran at p. 7; p. 11; p. 15; Ex. 1; Ex. 3). As a result the Claimant took off, as vacation, Friday May 1st through Tuesday May 5. (Tran at p. 2;

p. 11-12). (The record does suggest that perhaps the 4th was a scheduled day off, but, as the difference is not material, we do not resolve the issue). His hours were covered by an assistant. (Tran at p. 2-3; p. 6; p. 9; p. 10; p. 11; p. 20-21). On the night of Tuesday May 5, Mr. Williams called the Claimant and left a voicemail. (Tran at p. 3). He instructed the Claimant to call back within ½ hour or be terminated. (Tran at p. 3; p. 26-27). He mentioned no alternative to these two outcomes. (Tran at p. 3; p. 8). The Claimant did not get the call because he was sick in bed and asleep. (Tran at p. 3-4). When the Claimant awoke sometime around 1 a.m. on May 6 he checked his phonemail. (Tran at p. 3-4). He found Mr. Williams' message and knew that he had missed the deadline. (Tran at p. 4; p. 5). The Claimant now understood that he was terminated. (Tran at p. 2; p. 4; p. 9, ll. 17). In a hope of salvaging his resume the Claimant called a left a message that he had quit. (Tran at p. 4; p. 9; Ex. 2). The Claimant hoped that this would be less damaging to his career since he quit before being personally told he was fired. (Tran at p. 4). At the time, the Claimant called in his putative quit he did not intend to sever the employment as he understood that it had already been severed.

REASONING AND CONCLUSIONS OF LAW:

Did the Claimant Quit?: Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: Voluntary Quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871–24.25 provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). As we have found above the Claimant did not intend to quit. All the Claimant tried to do was save a little pride and leave a message that he quit before actually receiving the person-to-person confirmation of his discharge. Prior to the Claimant's call he had been told that he had to call within 30 minutes or be fired, and no alternative or exception was stated. (Tran at p. 8). A reasonable person would believe, as the Claimant did, that he had been fired. Believing this, the Claimant lacked the intent required to quit. In the alternative, we find that even if the Claimant did intend to quit it was not a disqualifying voluntary quit in that he was facing a "quit or be fired" scenario. 871 IAC 24.26(21).

Was the Claimant fired?: "A discharge is a termination of employment initiated by the employer" for cause rather than lack of work. 871 IAC 24.1(c). This means that if there is evidence that the Employer initiated the severance of the employment relationship and that the Employer communicated to the Claimant, directly or indirectly, that the Employer was initiating a severance of the relationship then the Claimant is, by that act, discharged. See generally Keast v. Unemployment Compensation Board of Review, 94 Pa.Cmwlth. 346, 503 A.2d 507 (1986)(requiring that "language used by an employer possesses the immediacy and finality of a firing"); Goddard v E G & G Rocky Flats 888 P2d 369 (Colo App, 1994); Bowen v. District of Columbia Dept. of Employment Services, 486 A2d 694 (D.C. App. 1985)(discipline/warning not a termination); Morgan v. Unemployment Ins. Appeals Bd. 6 Cal Rptr 2d 34 (Cal. App., 4th Dist 1992)(same); Spatola v Board of Review, 72 NJ Super 483, 178 A2d 635 (1962)(same). Basically, if the Employer says "you're fired" then you're fired.

The Employer in the case at bar does not assert that it terminated the Claimant. The Claimant may have believed he was terminated once he had passed the ½ hour deadline for calling Mr. Williams. The evidence establishes that Employer did not, however, actually terminate the Claimant. There being no termination in fact, the Claimant cannot be disqualified for having been terminated based on possible misconduct.

In the alternative, the record could support the conclusion that the Claimant was in fact discharged when he failed to call back. The cause of such a discharge would be the Claimant's absence for health reasons. The Claimant would be disqualified only if these constituted misconduct. The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. Sallis v. Employment Appeal Bd, 437 N.W.2d 895, 897 (Iowa 1989). 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"). We limit our discussion to the issue of being "unexcused." Under the rules personal illness is always reasonable grounds for missing work. 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"). Also the Employer concedes that the Claimant had properly handled calling in. (Tran at p. 17; *see also* p. 3). The absences were therefore excused under the law and could not, even if excessive, be disqualifying. Even if the Claimant had been terminated, any termination has not been shown to be for misconduct.

DECISION:

The administrative law judge's decision dated August 17, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. 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

RRA/fnv

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 Kuester

RRA/fnv

The Claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence (records) were examined, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv