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

LEE BRADLEY	:	
	:	**HEARING NUMBER:** 10B-UI-01643
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
DEERY BROTHERS INC	:	
Employer.		

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. 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:

Lee Bradley (Claimant) was employed as a full-time sales consultant from February 25, 2008 through January 4, 2010. (Tran at p. 2; p. 5-6). He requested time off to move his mother from an assisted living facility to another residence. (Tran at p. 2; p. 6; p. 7; p. 8; p. 9-10). He is an only child. (Tran at p. 12). He had originally requested only December 28 and 29, 2009. (Tran at p. 2). The Employer allowed him to take off two days, provided he return to work on December 30, 2009. (Tran at p. 2-3; p. 7). The move took longer than the Claimant had planned and the Claimant did not return to work until January 4, 2010. (Tran at p. 2-3; p. 5). He twice called and left a voice mail message on the Employer's machine informing them that he would need additional time. (Tran at p. 5; p. 7; p. 12). One of these messages included that the Claimant intended to return on January 4. (Tran at p. 7; p. 9; p. 10). The Employer was closed on New Year's Day. (Tran at p. 3). The Employer did not tell the Claimant that failure to return by the 30th would result in termination. (Tran at p. 3).

REASONING AND CONCLUSIONS OF LAW: We find the Claimant was not disqualified whether the case is treated as a quit, or a discharge.

Termination Analysis: Treating this case as a termination the Employer can prevail if it has proven misconduct.

Iowa Code Section 96.5(2)(a) (2009) 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.*

Here, given the Claimant's need to care for his mother is obviously reasonable grounds for the absence. On failure to report we have found that the Claimant did notify the Employer that he would be absent through the fourth. Under the circumstances no more notice than this is required by the Employment Security Law. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). Yet even counting the 30th, 31st and 2nd as unexcused and we cannot find that the Employer has proven the Claimant had *excessive* and *unexcused* absences. Misconduct has not been proved.

We recognize that in the past a different majority of this Board has found successive days of no call/no show to be misconduct. This case differs in several important respects. First, there were *two* calls here, just not personally to the supervisor. The Employer knew why the Claimant was off, and knew it even before the first allegedly unapproved day off. Then the Employer was informed when the Claimant would be returning. Second, the Claimant had left for compelling personal reasons with the prior knowledge of the Employer. As discussed below, where the break in employment is less than ten days such a quit is not disqualifying. This *Code* section makes no mention of calling in during the ten days. It would be incongruous for the Code to allow this ten day break in employment, but then deny benefits if the Employer could fire the Claimant fast enough for failing to do something the Code does not mention.

Quit Analysis: In the alternative, if we were to find that the Claimant quit, we would still not disqualify him. This is because he has proven that he left for compelling personal reasons and that his absence was not for more than ten working days.

Iowa Code Section 96.5(1) states:

> Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
> … .
> f. The individual left the employing unit for not to exceed ten working days, or such additional time as may be allowed by the individual's employer, for compelling personal reasons, if so found by the department, and prior to such leaving had informed the individual's employer of such compelling personal reasons, and immediately after such compelling personal reasons ceased to exist the individual returned to the individual's employer and offered the individual's services and the individual's regular or comparable work was not available, provided the individual is otherwise eligible; except that during the time the individual is away from the individual's work because of the continuance of such compelling personal reasons, the individual shall not be eligible for benefits.

The Claimant's laudable desire to care for his mother, and ease her personal transitions is most definitely a "compelling personal reason" for missing work. The parties agree that the "prior to such leaving [the Claimant] had informed [his] employer of such compelling personal reasons" and that "immediately after such compelling personal reasons ceased to exist the [Claimant] returned to the …employer and offered the [his] services." The *Code* does not require that the Claimant tell the Employer *how long* he will be gone before departing, nor that he keep the Employer posted in the interim. Finally, the Claimant's total time from work was only five working days. We therefore find that even if the Claimant did quit he has proven that it was not a disqualifying quit by operation of Iowa Code §96.5(1)(f).

DECISION:

The administrative law judge's decision dated March 16, 2010 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss

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/ss

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, 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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Monique Kuester

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Elizabeth L. Seiser

RRA/ss