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

SAKINA D JONES Claimant, and TYSON FRESH MEATS INC Employer.	:	HEARING NUMBER: 09B-UI-07545 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 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:

Sakina Jones (Claimant) worked as a full-time production worker for Tyson Fresh Meats (Employer) from October 14, 2008 until the date she was fired on April 21, 2009. (Tran at p. 2-3). She had received the employer's attendance policy and knew she was subject to discharge if she accumulated 14 points. (Tran at p. 3-4). The last time she obtained a print out of her point total was around April 1, 2009, when she had 10.5 points. (Tran at p. 4; p. 6-7).

The Claimant had been working second shift but she asked to be moved for personal reasons. (Tran at p. 8-9; p. 13-14). This change was effective April 13, 2009. (Tran at p. 11). The Claimant was 15 minutes late to work every day that week because she did not know when that particular production line

started. (Tran at p. 8-9; p. 10; p. 11).

On Thursday, April 16, 2009, a co-worker, who had called in absent that day, left voice mail messages on the Claimant's cell phone accusing her of sexual misconduct such as sleeping with everybody at work, and calling her vulgar names. (Tran at p. 12; p. 14). The Claimant had previously told her supervisors that people were spreading rumors of this sort about her. (Tran at p. 12-13; p. 18). When she received the messages on her phone the Claimant went to her boss and was crying. (Tran at p. 14). She told him that she had to leave because she was so upset about the rumors at work. (Tran at p. 14-15). Nothing had been done about her previous complaints. (Tran at p. 15; p. 17). When the Claimant told her supervisor she was leaving he did not specifically object. (Tran at p. 15; p. 16).

When she returned to work on April 17, 2009, she was sent home and then suspended on Monday, April 20, 2009. (Tran at p. 15-16). The next day she met with the human resources representative who told her she was fired for accumulating too many points. (Tran at p. 3; p. 16).

REASONING AND CONCLUSIONS OF LAW:

Although the Employer does not now claim the Claimant quit it does appear that this claim was made at some point. (Tran at p. 16; p. 19). Indeed the Employer did not show at hearing and has supplied no argument. Suffice it, that the requisite intent to quit has not been shown. *Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992) (upset walk-off not a quit). The remainder of out analysis is thus concerned with whether misconduct has been proven.

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").

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.W2d 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). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). Specifically, "[h]abitual tardiness, particularly after warning that a termination of services may

result if the practice continues, is grounds for one's disqualification." Higgins v. IDJS, 350 N.W.2d 187, 192 (Iowa 1984)(quoting Spence v. Unemployment Compensation Board of Review, 48 Pa.Cmwlth. 204, 409 A.2d 500 (1979).

The Employer has made it difficult on itself by neither appearing at hearing nor even submitting argument on appeal. Yet even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. See Hy Vee v. Employment Appeal Board, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer]). Under the rules of the Department "a party's failure to participate in a contested case hearing shall not result in a decision automatically being entered against it." 871 IAC 26.14(9). Thus judgment is not automatic when the party with the burden fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

We conclude that the Employer has failed to prove misconduct because the Claimant's final absence was for reasonable grounds and properly reported. The record shows that the Claimant was the object of rampant and highly offensive rumor from her co-workers. She complained and nothing was done. When she then got the highly disturbing phone mail message from a co-worker she became understandably upset. She did tell her supervisor she was leaving, but she was too upset to know if she had specific approval to leave. In any event, the Employer certainly has not shown that the Claimant did not have approval. The absence was properly reported to the supervisor. Given the Claimant's circumstances anyone would become upset and the absence was also for reasonable grounds.

The Employer has failed to prove that the final absence was either not properly reported or not for reasonable grounds. Where an employer counts against an employee's attendance record incidents that are not "unexcused" under the Employment Security Law the question is whether the termination would have occurred had those incidents not been held against the employee. If not, then the termination is caused by an absence that is not misconduct and the Claimant would be eligible for benefits. Here, as we have found, the Employer failed to prove that the final absence, which was the precipitating cause of the discharge, was "unexcused". The discharge was thus not caused by misconduct and is therefore not disqualifying. . See generally, West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992)("must be a direct causal relation between the misconduct and the discharge"); Larson v. Employment Appeal Bd., 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); Lee v. Employment Appeal Board, 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). In addition, since the final absence was not proved to be unexcused the Employer failed to prove that the Claimant was terminated for a current act of misconduct. Even assuming the history of the Claimant's absences/tardiness is unexcused, the final incident was not unexcused under the law, and thus the final absence cannot justify a disqualification. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989); Cosper v. IDJS, 321 N.W.2d 6, 10 (Iowa 1982); Gaborit v. Employment Appeal Board, 743 N.W.2d 554, 557-58 (Iowa App. 2007).

We do recognize that the final absence in this case was a walk-off. Walk-offs are a particularly serious form of absence. One might even consider them to be a form of insubordination. But in cases of alleged insubordination we must consider the circumstances and the worker's reason for non-compliance. *See Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985). A walk-off would not be insubordinate if it is in good faith or for good cause. *See Woods v. Iowa*

Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). "The key question is what a reasonable person would have

Believed under the circumstances." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988); *accord O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993)(objective good faith is test in quits for good cause). We have already held that the Employer has not proven that the final absence lacked reasonable grounds. We, for the same reasons, hold that the Employer has not proven that the Claimant lacked good faith or good cause when she walked off the job. Any disregard of the Employer interests was not shown to be willful and wanton. Misconduct has not been proven and the Claimant should be allowed benefits.

DECISION:

The administrative law judge's decision dated June 10, 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 F. Kuester

RRA/fnv