

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

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**LEEANN B RIMKUS**

Claimant,

and

**IOWA PHYSICIANS CLINIC**

Employer.

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**HEARING NUMBER: 13B-UI-14302**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**SECTION:** 10A.601 Employment Appeal Board Review

**D E C I S I O N**

**FINDINGS OF FACT:**

A hearing in the above matter was scheduled for January 9, 2013 in which the issue to be determined was whether the Claimant was discharged for misconduct; and whether the Claimant voluntarily left for good cause attributable to the Employer. During the hearing, the Employer indicated that they have a point-system attendance policy for which the Claimant received three warnings; one for improper e-mail usage; and two for attendance. The Claimant's attorney was not allowed to develop the record through testimony regarding the nature of the Claimant's absences for which she received two warnings.

The administrative law judge's decision was issued January 10, 2013, which determined that the Claimant was discharged for disqualifying misconduct. The administrative law judge's decision has been appealed to the Employment Appeal Board.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 10A.601(4) (2011) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

The Employment Appeal Board concludes that the record as it stands is insufficient for the Board to issue a decision on the merits of the case. As the Iowa Court of Appeals noted in *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise.

While the Employer testified that the Claimant received a 1st level warning on March 17<sup>th</sup> for improper use of e-mail, the remaining warnings (2<sup>nd</sup> and 3<sup>rd</sup>) were due to attendance issues. The record, however, is void of evidence as to whether the absences that led to the warnings were considered excused or unexcused absences. The court in *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. See also, *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the Employer was fully within its rights to assess points or impose discipline up to or including discharged for the absence under its attendance policy. We would also note that exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct. In addition, the court in *Infante v. Iowa Department of Job Service*, 364 N.W.2d 262 (Iowa App. 1984) stood for the proposition that if prior acts, each considered alone, are unworthy of termination, then the last act can't rise to the legal definition of misconduct. In *Infante*, the court considered the Claimant's prior infractions separately as to whether each was a disqualifying event, in and of itself. As to *Infante's* first infraction, failure to comply with the Employer's instructions, the Claimant's failure was due to a misunderstanding and not intentional. Thus, she was deemed to have dissatisfactory conduct, not misconduct. *Infante's* second infraction involved the Claimant's failure to properly clean a room. The Claimant satisfactorily cleaned everything, but a rusty wheelchair which could not come clean with the available cleaning materials. The court found her inability to completely clean the room was not intentional, and therefore, not misconduct. As to the third and final warning that led to *Infante's* termination (absenteeism), the court concluded that her absences that were due to illness were excused and not misconduct when viewed standing alone.

Since we do not know the nature of the Claimant's attendance issues that led to the final warning, the Board must remand this matter so that the Claimant's attorney may elicit testimony as to the nature of the Claimant's absences that resulted in her 2<sup>nd</sup> and 3<sup>rd</sup> warnings.

**DECISION:**

The decision of the administrative law judge dated January 10, 2013 is not vacated. This matter is remanded to an administrative law judge in the Unemployment Insurance Appeals Bureau, for further development of the record consistent with this decision, unless otherwise already addressed. The administrative law judge shall conduct a hearing following due notice, if necessary. If a hearing is held, then the administrative law judge shall issue a decision which provides the parties appeal rights.

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John A. Peno

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Monique F. Kuester

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Cloyd (Robby) Robinson

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