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

MARIA G ROSAS	:	
	:	**HEARING NUMBER:** 13B-UI-07023
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
SWIFT PORK COMPANY	:	
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. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Maria Rosas (Claimant) worked for Swift Pork Co. (Employer) as a full-time production worker from March 26, 2008 until she was fired on June 25, 2012. The Employer's attendance policy is no-fault and points are assessed for absences and tardies. An employee who is going to be absent must call the dedicated attendance line at least 30 minutes before the start of their shift. A properly reported absence is assessed one point, but calling in after the 30-minute window is assessed two points. Nine points in a rolling 12-month period is grounds for discharge.

The Claimant received a written warning for attendance in February 2011 and a second one in February 2012. Her most recent absences started Friday, June 15, 2013, when she called in properly to notify the employer of her absences. On Monday, June 18 through Thursday, June 21, 2013, the Claimant called in less than 30 minutes before the start of her shift. The Claimant mistakenly believed that she could not call in more than 30 minutes before the start of the shift. She thought she had to call at the thirty minute mark. As a result these last four absences were assessed at two points each and, with the one point for the absence

which was properly called in, she had accumulated nine points.

Resources Manager Aureliano Diaz met with the Claimant on Monday, June 25, 2013. She had statements from her doctor excusing her from work for those days. At first she insisted she had called in a timely manner but the Employer provided her with the hard copy of all her calls. She and a union representative checked the information and it was confirmed she had not called in at least 30 minutes before the start of her shift. The Claimant was terminated for exceeding the attendance point level.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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).

> 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)(emphasis added); *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.*

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).

Looking to the Claimant's absence our focus is on the final five. The regulations specifically list illness as reasonable grounds for absence. Thus the final five absences are all for reasonable grounds as a matter of law. *E.g. Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa App. 2007).

More critically here is the question of whether the absences were "properly reported." It is clear that the absence on June 15 was properly reported and thus is an excused absence under the law. We now turn to the reporting of the final four.

Gaborit v. Employment Appeal Board, 743 N.W.2d 554, 557-58 (Iowa App. 2007) makes clear that it is the law, not an employer, who determines if an absence is for "reasonable grounds." We do not think this applies with full force to "properly reporting" an absence, however. The issue of proper reporting varies from employer to employer depending on business need. Thus, as a general matter, we measure proper reporting against the employer's policy. The unique thing about this case, however, is that the Claimant

clearly misunderstood the policy. She in good faith tried to comply with it. But since she thought she could not call in *before* the thirty minutes, and since clocks may not be perfectly synchronized, she was calling in at slightly less time than necessary to comply with the policy. This good faith error caused the assessment of the additional points, thus causing her discharge. Thus, in effect, we have a Claimant discharged for making good faith errors that are not normally disqualifying. Under the unique circumstances of the case, we find that the good faith mistake in calling in means that the Claimant did not fail to properly report the absence. This is bolstered by the fact that the Employer knew the Claimant would likely be missing work, and thus had a lesser need for early notice. *See Floyd v. Iowa Dept. of Job Service,* 338 N.W.2d 536, 538 (Iowa App., 1983) ("His employer knew that he was ill, and had fair warning that petitioner might be absent for an extended period of time due to that illness."). Again, we do not excuse failure to comply with call-in policy in cases where employees simply fail to familiarize themselves with policy, or choose to ignore policy, or just don't care. Here the Claimant did care but honestly misunderstood. This is not disqualifying misconduct.

DECISION:

The administrative law judge's decision dated September 20, 2013 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.

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John A. Peno

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Cloyd (Robby) Robinson

RRA/fnv