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

BARBARA J CALLIES	:	
	:	**HEARING NUMBER:** 16B-UI-09275
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
WESTVIEW PROPERTIES LLC	:	
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. 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:

Barbara Callies (Claimant) worked for Westview Properties LLC (Employer) as a full time certified medication aide from July 18, 2013 until she was fired on July 28, 2016. Under the Employer's attendance policies a worker is subject to discipline if they amass 2 attendance points in a rolling 3 month period. The Employer treated the Claimant's single absence on July 26 as a "self" termination.

As far as the record shows the Claimant was absent in 2016 only for illness on 5/12 and 5/13 and from 7/8/16 through 7/24/2016. The Claimant was released to work on July 25. She had, about a month before, requested the 26th off so she could volunteer for RAGBRAI. The Employer approved it. The Employer meanwhile assigned workers to work a "triage tent" for RAGBRAI but approved the Claimant's request because it had enough workers to cover its normal operations. One of these workers notified the Employer

of that worker's inability to work on July 26. This was about July 22. On July 22 the Employer informed the Claimant she had to work the 26th. The Claimant said she would not be, and gave this same response whenever the Employer told her she had to work on the 26th including on the 25th. The Claimant did not come to work on the 26th. She was then fired on the theory that she was "no call, no show" and was thus a "self termination." The Employer fired the Claimant for absenteeism which it called job abandonment. The Claimant did not intend to quit. (Ex. F).

We find that the Employer has failed to prove by a preponderance of the evidence that the Claimant was absent on May 27, June 30, and July 1 as asserted by the Employer.

REASONING AND CONCLUSIONS OF LAW:

Quit Versus Fired: 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. *Irving v. EAB,* 883 N.W.2d 179 (Iowa 2016). On the issue of whether a quit is for good cause attributable to the employer, the Claimant had the burden of proof by statute. Iowa Code §96.6(2). "[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). Here the Claimant clearly only intended not to come in for a single day. She did not quit. Nor was she no call, no show since the Employer well knew she wasn't coming in. We thus analyze the case as a discharge.

Legal Standards For Discharge Disqualification: Iowa Code Section 96.5(2)(a) (2014) 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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. *Higgins v. IDJS*, 350 N.W.2d 187, 190 (Iowa 1984).

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final absence which caused the absence was unexcused. Here the only recent absences shown in the record, other than the final one, were for illness. This is a reasonable basis for absence as a matter of law. 871 IAC 24.32(7); *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa App. 2007). Since the Claimant promptly notified the Employer of the continued medical need for absence, these 2016 absences were also properly reported. This leaves only the final absence. We assume for the purposes of analysis that the final absence is unexcused.

Excessiveness: Having identified the unexcused absences, i.e. the final one, we now ask whether the absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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); *see 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).

We have little trouble finding that a single unexcused absence is not excessive. The prior problems from 2014, and 2015 would not *clearly* count against the Claimant under the Employer's policies. Moreover, since the unexcused absence in 2015 is still over a year old, the unexcused (nonmedical) absences in 2014 and 2015 are too stale for us to count as a part of a pattern of absenteeism under the law. While the Employer asserts 19 absences in 2016, we see only the ones detailed above, all properly reported and for illness with the single exception of July 26.

Single Absence Analysis: In the alternative we take up the question of when absences may be misconduct even when not excessive. In instances where an employee is fired for a *single* unexcused absence the issue is somewhat different than with excessive absenteeism. See *Hiland v. EAB,* No. 12-2300 (Iowa App. 7/10/13). With a single absence misconduct can be shown based on things such as the nature of an employee's work, the effect of the employee's absence, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of the absence. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). Here the Claimant is a CMA and we can understand that in the usual run of things a single no call/no show but such a worker could be misconduct. This is not the usual run of things. First, the Employer fully knew that the Claimant was not coming in so this is not "no call." Second, the Claimant had been given the day off, and then had this rescinded shortly before the day in question, and this created difficulties for the Claimant. She had reason for the absence. Third, the only reason the Employer needed the Claimant was because it had sent workers

to work at tents for RAGBRAI, and the Employer was unwilling to pull one of those workers. Instead, it chose to pull the Claimant off *her* volunteer work. But there was no dishonesty by the Claimant, no falsification, and the effect on the Employer would be to take someone off a duty that was not part of the Employer's normal operation. We cannot say the Claimant should be disqualified on a single absence theory.

DECISION:

The administrative law judge's decision dated September 15, 2016 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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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv