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

KARLA S RANKIN	:	
	:	HEARING NUMBER: 08B-UI-02823
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
FLORIST DISTRIBUTING 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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Karla S. Rankin, worked for Florist distributing, Inc. from August 9, 2004 through February 19, 2008 as a full-time administrative assistant. (Tr. 2, 5, 9) Each year, the claimant received two weeks vacation time and three days PTO. (Tr. 10) Between April 9, 2007 and February 18, 2008, the claimant missed 10.5 days of work due to properly reported personal illness; nine of these days were accompanied by medical documentation. (Tr. 6, 8) Ms. Rankin was absent two times due to her son's health. (Tr. 8) She also took PTO which was approved in advance to be with her grandfather who had surgery. (Tr. 12, 16) Ms. Rankin also took time off which she was allowed to make up due to weather issues. (Tr. 8)

For all but the final absence, the claimant was allowed to use time in her vacation or PTO leave bank or to make up time. At the time of her discharge, the claimant had not exhausted her annual allotment of leave time. (Tr. 10)

The employer issued a verbal warning on October 19, 2007 for multiple issues. (Tr. 4, 9, 15) She received a written warning January 2, 2008 for missing too much work (Tr. 4, 9, 15) Her next written warning was February 13, 2008, and included the warning that further infractions would result in termination. (Tr. 4, 9, 12, 13)

The final incident occurred on February 18, 2008 when the claimant called Troy (the director) to report that she couldn't get to work because her car was stuck in the snow. (Tr. 3, 9, 14, 18) The city of Lacona received nearly "… twelve inches of snow… and a quarter inch of ice." (Tr. 16) The employer directed her to keep in touch with him, which she did because she was concerned about her job. (Tr. 14, 15) When the claimant realized she could not get in, she contacted Troy again and was told "… fine…" It was understood that the claimant would report the next day. When the claimant returned to work, the employer terminated her for missing work the previous day. (Tr. 3, 14)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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).

Evidence supports that the employer issued several warnings about attendance that cited pre-approved time off as well as time off for properly reported absences due to a period of illness (which were also backed up with medical verification). (Tr. 4, 9) The claimant received her final warning on February 13, 2008 wherein she was also put on notice that her job was in jeopardy for absenteeism. Testimony establishes that when the claimant took vacation days, made time up, or left work early, it was with her supervisor's approval. However, the employer failed to provide documentation of the claimant's attendance record to clearly indicate which absences would be considered unexcused for unemployment insurance purposes.

As for the absences due to illness, Ms. Rankin provided unrefuted testimony that she properly reported these absences. (Tr. 6-7, 15-16) Thus, as to those days, her absences are considered excused. See, Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). As to the final incident that led to her termination, the employer does not refute that the city of Lacona experienced a foot of snow and some ice that hindered the claimant's ability to report to work on February 18, 2008. (Tr. 14) The record shows that Ms. Rankin kept the employer apprised of her circumstances not only because it was the reasonable thing to do, but because she was cognizant of her last warning, and earnestly sought to comply with his directive. (Tr. 14) When she was finally able to get free from the snow, she contacted the employer whom she understood to tell her that it was okay for her to just come to work the following scheduled day. In Ms. Rankin's mind, she reasonably believed she was authorized to stay off work for the remaining part of her shift. The employer disagrees with her belief, citing that considering her final warning, she should have made some effort to report to work later.

We beg to differ. Considering the combination of 'soft' and confusing evidence regarding her record of unexcused absences, and the misleading feedback from the supervisor for the final incident, we see how the claimant would believe she would not be penalized for her absence on that day. We would also note that in cases where misconduct is established regarding excessive absenteeism, the employer often furnishes documenting evidence that clarifies the nature and amount of absences. Such is not the case here. For these reasons, we conclude that the employer failed to satisfy their burden of proving she deliberately disregarded the employer's final warning or that her record of absences was excessive according to unemployment insurance law.

DECISION:

The administrative law judge's decision dated April 8, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. 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

AMG/fnv