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

DAWN M GEORGE Claimant and **SWIFT PORK COMPANY** Employer	:	**HEARING NUMBER:** 17BUI-08542 **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, 96.3-7

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:

Dawn George (Claimant) worked for Swift Pork Company (Employer) as a full-time production worker from June 9, 2008 until she was fired on June 13, 2017. The Employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. The Employer requires employees to contact the Employer and report their absence at least thirty minutes prior to the start of their shift. The Employer uses an automated call in line that allows employees to select from an option (sick, other, leave of absence, injury, FMLA) as to the reason for their absence. Claimant was aware of the employer's policy.

On March 20, 2017, the Employer gave the Claimant a warning due to her absenteeism. She was warned that her job was in jeopardy. She was also issued written warnings in 2017 for her attendance infractions on February 3, 2017 and January 16, 2017. Claimant received attendance points on: March 31, 2017; April 17 and 19 (late), 2017; May 1, 2, 5, 8, 9, 10, 30, and 31, 2017; and June 1, 2, 5, 6, 7, 8, and 9, 2017.

The Claimant was on short-term disability from May 11, 2017 through May 26, 2017. The third party short-term disability company informed the Employer that Claimant was released to return to work after May 26, 2017. After May 26, 2017, Claimant accumulated attendance points because she did not return to work and she was absent for her scheduled shifts on: May 30 and 31, 2017, June 1, 2, 5, 6, 7, 8, and 9, 2017. Claimant accumulated one attendance point for absence.

Prior to each of her final nine absences, and in compliance with the Employer's policies, the Claimant contacted the Employer and reported she was absent these days due to illness. The Employer understood that the reason given for the absences was the same injury for which Claimant had been on short-term disability. The Employer discharged Claimant on June 13, 2017 when she had a total of 17 attendance points. The Employer sent the Claimant a letter notifying her that she was discharged.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards For Discharge Disqualification: Iowa Code Section 96.5(2)(a) (2017) 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"). 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.*

Unexcused: As an initial matter even though a party fails to appear at hearing it is still possible for that party to carry a burden of proof through evidence introduced by the opposing party. *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], and not by the claimant, does not diminish the probative value of it."). Here the Claimant did not appear, but as in *Hy Vee* the credible evidence from the Employer leads us to find that benefits are allowed. We note that in *Hy Vee* the Claimant had the burden of proving good cause for her quit, whereas in the case at bar the Employer has the burden of proof.

In *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa App. 2007) the Court of Appeals found that the mere failure to supply a physician's note for a properly reported absence did not negate the reasonable grounds for the absence just because the employer imposed a physician note requirement. The Court held instead that the question of whether an absence is excused under the Employment Security Law turns on the law and not on conditions imposed by employers. In the case of *Timmons v. EAB,* No. 16-0551 (Iowa App. 2-8-2017) Ms. Timmons was absent from work on an approved leave. This was caused by her medical condition.

She was released to work with no restrictions. When she came to work she found that side effects from her medication had caused her not to be able to work. She then missed work to her illness but she never got a doctor's note saying so. She was then fired for her accumulation of too many attendance points. The Court of Appeals held that "her final absence from work does not constitute misconduct under the applicable Iowa Code and Iowa Administrative Code provisions because the undisputed evidence established the absence was due to illness and the absence was properly reported to her employer." Slip op. at 8. The fact that Ms. Timmons did *not produce a doctor's note* did not alter this result since "it was not Timmons's burden to prove she did not commit misconduct at the agency hearing." Slip op. at 8-9.

These holdings dispose of any argument that leave approval can be required before an absence is excused under our law. To be sure, the failure to present timely physician notes implicating leave may mean that the relevant absences are not protected by applicable laws (if any). But it does not make them "unexcused" for our purposes. The Employer can, for *its* purposes, insist that absences are only excused for illness if the employee has medically approved leave. Indeed, the employer in *Gaborit* insisted that a physician's note is required before an absence can be excused for illness. Employers are free to count against employees such employer-defined unexcused absences. But employer-imposed conditions on the excusing of absences have no bearing on whether absences are considered excused under the Employment Security Law. This was the holding of *Gaborit* and it applies here. Just as the failure to have a physician's excuse did not by itself render Ms. Gaborit's absence unexcused, nor render Ms. Timmons proof of illness inadequate, the failure to have a physician's note which the Employer considered sufficient to meet leave does not by itself render the Claimant's final absences here unexcused.

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the evidence that that Claimant was absent for illness. While the Claimant did not testify, she has no burden in a misconduct case, and the Employer's own evidence establishes that the final absences were due to illness. The fact that the third-party administrator indicated a return date does not convince us by a preponderance that the final absences were not really for illness. The fact that the Claimant was undoubtedly injured, and had been off work for the injury, tends to provide corroboration to the claim of illness. The evidence is in some conflict but on balance we find that the Employer has not proven the final nine absences were for anything but properly reported illness. These final absences thus have not been shown to be unexcused.

Excessiveness: The difficulty for the employer in this case is that the final absences of the Claimant are excused under the law. Where the precipitating and sufficient cause of the discharge is an excused absence the discharge is not caused by misconduct and is therefore not disqualifying. See g*enerally, 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). Even assuming the history of the Claimant's absences/tardiness is unexcused, the final absence, without which no termination would have occurred, was not unexcused under the law and thus the final absence cannot support a disqualification. *See Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007); *Gimbel v. EAB*, 350 N.W.2d 192 (Iowa App. 1992); *Roberts v. Iowa Dept. of Job Services*, 356 N.W.2d 218 (Iowa 1984); *see generally Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982); *Timmons v. EAB,* No. 16-0551 (Iowa App. 2-8-2017).

DECISION:

The administrative law judge's decision dated September 7, 2017 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.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by Claimant was not presented at hearing. Accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

The Claimant has request a remand but as benefits are allowed the request is now moot.

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Ashley R. Koopmans

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James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

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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Kim D. Schmett

RRA/fnv