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

DIANNE L HUFSTEDLER

Claimant,

and

I C SYSTEM INC

Employer.

HEARING NUMBER: 09B-UI-10898

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

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:

Dianne Hufstedler (Claimant) was hired as a full-time collection representative from September 20, 2004 until September 26, 2008 when she was discharged. (Tran at p. 2; p. 6). Prior to February 7, 2008 the Employer had a policy that allowed collectors to take an hour lunch, rather than a half-hour, so long as the time was made up later in the workweek. (Tran at p. 6-7). On February 7, 2008 the Employer changed the policy so that collectors had the option at that point to take an hour lunch rather than a half hour but the time must be made up the same day at the end of the shift. (Tran at p. 2; p. 5). Although the Employer asserts that this policy was distributed to the employees in their company mailboxes the Employer has not proved by a preponderance of the evidence that the employees did in fact receive such notice. (Tran at p. 5; p. 6; p. 8; p. 9). Every witness testified that she was unaware of the policy at the

time that the Claimant was terminated. (Tran at p. 5; p. 6; p. 8; p. 9). This even includes the Employer's witness who did not know of the policy until informed of it by the house care supervisors after the fact finding interview. (Tran at p. 6, ll. 14-18).

The Claimant had been warned about attendance and tardiness on March 21, 2008 (verbal), July 31 (verbal), and August 13, 2008 (written) for tardiness on November 11, 2007 and May 20, 2008 and unscheduled vacation time on July 22 and unscheduled flex time on July 31. (Tran at p. 3-5; p. 8).

On September 25 the Claimant took an hour lunch break but only worked to the point of making up 45 minutes of that hour and not the full hour. (Tran at p. 2; p. 7). The Claimant told her supervisor that she was taking a long lunch but did not speak to him about when she would make up the time. (Tran at p. 7). The Claimant planned to make up the remaining 15 minutes the next day (Friday). (Tran at p. 7). Between February 7, 2008 and September 25, 2008 the Claimant had not taken a long lunch. (Tran at p. 8). The Claimant was discharged for absenteeism based on the Claimant's discipline history and on the incident of September 25. (Tran at p. 2). Had the September 25th long lunch incident not occurred the Claimant would not have been discharged. (Tran at p. 2).

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.

"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).

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). While prior incidents affect the weight of the final incident they do not dictate its character, that is, if the final incident does not involve intentional action or demonstrate negligence of equal culpability it

cannot be the basis of a disqualification. Past acts of possible misconduct are taken into account when considering the "magnitude of a current act". They do not convert innocent mistakes into misconduct. Otherwise the discharge would not be for a current act of "misconduct".

While the Claimant's actions were technically in violation of the Employer's policy this was not known to the Claimant at the time of her actions. The Claimant thought she was doing exactly as allowed by past policy. Further the failure of the Claimant to know about the change was not shown to be due to any lack of diligence on her part. The record fails to establish that the Employer took effective action to disseminate the policy change to its employees. By unknowingly acting contrary to policy the Claimant acted in good faith. The Claimant's mistake, if mistake it be, was an honest good faith error. The Claimant will not be disqualified if the Employer shows only "good faith errors." 871 IAC 24.32(1)(a). Where the Employer proves that the Claimant honestly believed she could make up time on subsequent days pursuant to the old policy but does not prove that the lack of knowledge of the new policy is the fault of the Claimant, then no act of misconduct is shown. The fact of the Claimant's prior attendance issues does not raise this honest error in communication – which as far as the evidence shows is as attributable to the Employer as the Claimant - to the level of misconduct. The termination was not for a current act of misconduct and the Claimant should not be disqualified from benefits.

DECISION:

The administrative law judge's decision dated December 10, 2008 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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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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 Kuester

RRA/fnv