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

AMANDA MIDDLETON	:	
	:	**HEARING NUMBER:** 10B-UI-05502
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
WAL-MART STORES 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: 96.5-2A, 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:

Amanda Middleton (Claimant) work for Wal-Mart (Employer), most recently as a full-time as a cashier, until she was separated on March 5, 2010. (Tran at p. 1). Her last scheduled day of work was January 18, 2010. (Tran at p. 3). Her initial leave of absence beginning on January 19 expired on January 28, 2010 and she asked for an extension of the leave. (Tran at p. 2; p. 3). The Employer faxed the appropriate paperwork straight to her doctor on February 16 and 24, 2010. (Tran at p. 2; p. 5). The doctor did not return the paperwork. (Tran at p. 2). The Claimant was then terminated by the Employer for being on leave without approval. (Tran at p. 1). The Claimant continued to report her absences by calling the employer's 800 number every day she was gone. (Tran at p. 2; p. 4).

REASONING AND CONCLUSIONS OF LAW:

Did the Claimant Quit?: 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. 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).

The Claimant had already requested leave, and the next FMLA step would be for the Employer, if it desired, to request medical certification. The paperwork here was sent to the Claimant's physician, which is consistent with requesting a FMLA medical certification. Moreover the 15 day period for a response which the Employer gave the Claimant matches the minimum required under 29 CFR §825.305(b) for a response to a certification request. The greater weight of the evidence establishes that the paperwork requested from the Claimant was a medical certification. The failure to respond was by the Claimant's physician, not the Claimant. The Employer has failed to prove that the Claimant intended to quit merely because he physician did not respond to the certification request in a timely fashion. Moreover, the Employer testified that the Claimant continued to call in her absence every day. This is not the actions of someone who intends to quit. The Employer has not proven that the Claimant intended to quit, and so cannot prove that the separation in this case is a quit.

Standards For Misconduct: Treating this case as a termination, then, the Employer can prevail if it has proven misconduct.

Iowa Code Section 96.5(2)(a) (2009) 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.*

Failure to Request FMLA: In *Gaborit* 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. We think this holding disposes of any argument that filling out FMLA paperwork can be required before an absence is excused under our law. To be sure, the failure to fill out the FMLA forms may mean that those absences are not protected by federal law. 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 applies for FMLA. 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, the failure to have a physician's certification for FMLA purposes does not by itself render the Claimant's non-FMLA absences unexcused.

Application of Standards: The greater weight of the evidence establishes that the Claimant's absences were due to illness. There would, of course, be no other reason for the Employer to request paperwork from the Claimant's physician. By regulation illness is a reasonable grounds for absence. 871 IAC 24.32(7). The Employer, meanwhile, testified that the Claimant did comply with its 800-number requirement for reporting absences. The Employer has failed to show *any* absence that was either not for reasonable grounds or not properly reported. The Employer has failed to prove excessive absences that were *unexcused under the Employment Security Law*. Since the Claimant was fired for absenteeism, and since not a single legally unexcused absence is shown in the record, the Claimant is not disqualified for benefits.

DECISION:

The administrative law judge's decision dated June 1, 2010 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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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 F. Kuester

RRA/fnv

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (letter) was reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

RRA/fnv