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

TIMOTHY BUSS	:	
	:	HEARING NUMBER: 09B-UI-09148
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
AABACO HOLDINGS LTD	:	
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: 96.5-1

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:

Timothy Buss (Claimant) worked as a a full-time welder for Heavy Equipment Manufacturing (Employer) from February 11, 1998 to May 10, 2009. (Tran at p. 2; p. 10-11; p. 13). The Claimant generally worked Monday through Friday. (Tran at p. 2).

On May 7, 2009 the Claimant was upset because management was severely criticizing the welding that had been done. (Tran at p. 13). The Claimant said to a co-worker as a joke, "we ought to not come in." (Tran at p. 13; p. 15-16; p. 25). The Employer has not shown that the Claimant made any serious effort to convince anyone not to come in. (Tran at p. 13).

On Friday, May 8, 2009 the Claimant was on the way to work when he felt ill. (Tran at p. 13; p. 16-17). He asked his co-worker, who was driving, to take him home. (Tran at p. 13; p. 16-17). The co-worker reported the illness to the supervisor. (Tran at p. 13; p. 17).

On Saturday May 9, 2009 the Claimant came into the shop and was told by the foreman no work was available. (Tran at p. 13; p. 14; p. 15; p. 17-18; p. 20; p. 23). The Claimant did not come in on Sunday May 10 because it was not a normally scheduled day for him and he had been told there was no work available. (Tran at p. 13; p. 14). Ordinarily the Claimant did not work Sundays unless requested, and no one had told him to come in. (Tran at p. 14; p. 18). The Claimant was told by the Employer on May 10 that he was considered to have quit by no call/no show. (Tran at p. 2; p. 10-11; p. 28).

The Employer has not shown by a preponderance that the Claimant was no call/no show for three days.

REASONING AND CONCLUSIONS OF LAW:

Did The Claimant Quit By No Call/ No Show?: 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).

More specifically, the rules of the Department address the situation of no call/ no show:

> 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. However, the

claimant has the

> initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> …
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

871 IAC 24.25(4).

Here it is clear that the Claimant did not intend to quit. He tried to come to work but was sick. Then he came to work and was sent home for lack of work. And then he didn't come in because no one told him he was needed. He did not intend to quit. This leaves whether, regardless of intent, he can be deemed to have quit based on three days of no call/ now show.

Here the first day was "no show" but the Claimant did send word, and so it was not "no call." The second day was not "no show." The third day was not "no show" because the Employer has not proven the Claimant knew he was required to "show" that day. The rule requires three days of no call/ no show. Thus if any of the three days in question was other than no call/ no show the Claimant would not be deemed to have quit. Here we have zero days of proven no call/ no show. We cannot disqualify the Claimant based on the theory that he quit.

Was the Claimant fired for Misconduct?: Treating this case as a discharge the issue then becomes whether the Employer can demonstrate that the Claimant was fired for 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).

The Employer alleges what amounts to insubordination by the Claimant. The Employer argues that the Claimant supposedly refused to come in because he didn't want to work a weekend to fix another's mistake, and that the Claimant tried to get others not to come in. We do not find the Employer's evidence of these alleged infractions to be more credible than the evidence to the contrary. The Claimant did admit to joking around that "we ought to not come in" but denies that anything more than a laugh came out of this. We find that the Claimant made a stray remark out of frustration and that this was nothing more than an isolated instance of poor judgment, which is not disqualifying.

On the reason the Claimant failed to come in on Friday, the Employer introduced hearsay that the Claimant asked to be taken home because he wasn't going to fix Aaron's welds. (Tran at p. 8). The Claimant countered with his first hand evidence, and hearsay from the same witness contradicting the Employer's hearsay. As a fact-finding body it is frustrating to us that neither party chose to call the declarant. Be that as it may, we are left to weigh what we have in the record. On balance we find the Claimant's first-hand testimony, bolstered by his hearsay, to be more credible than the Employer's evidence. This is why we did not find that the Claimant in fact refused to come to work because he objected to the shift or to the work to be done. We found credible the Claimant's statement that he was feeling ill and this is why he did not come to work.

The Employer does assert attendance problems by the Claimant. But the evidence of these past problems is very sketchy. (Tran at p. 4; p. 12). Plus, it does appear that the Employer had a high tolerance for this, and that the Claimant would not have known he would be discharged for attendance. Frankly, if the Employer did not think the Claimant was no call/no show and/or the Employer did not think the Claimant was being insubordinate the evidence shows the Employer would not have fired the Claimant. (Tran at p. 6-7; p. 27). The Employer has failed to show that it would have fired the Claimant over attendance. (Tran at p. 29). Incidents that do not result in discharge cannot, by themselves, be a basis for disqualification. See generally, 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 if we were to ignore this, the Employer has not shown that the final absences (if the last weekend can even be called that) were unexcused and so the termination would not be for a *current* act of misconduct.

Finally, the Employer may be taken as claiming that the three-day no call/no show was misconduct. As we discussed above we just do not think the Claimant was no call/no show and so misconduct was not shown based on this theory either. Benefits are allowed.

DECISION:

The administrative law judge's decision dated October 21, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. 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/ss

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/ss