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

MARGIE J WILLIAMS Claimant, and NYSIVE HOSPITALITY INC Employer.	:	HEARING NUMBER: 09B-UI-12678 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:

Margie Williams (Claimant) was employed by Best Western City Centre (Employer) from July 8, 2005 until April 9, 2009 when she was discharged from employment. (Tran at p. 3; p. 7; Ex. 1). The Claimant worked as a part-time housekeeper and assistant supervisor and was paid by the hour. (Tran at p. 3; p. 7; p. 15). The supervisor over housekeeping was Matt Pranto. (Tran at p. 3). The Claimant considered "Rosie" to be her supervisor. (Tran at p. 7; p. 10).

On the afternoon of April 9 the Claimant had just finished making 12 beds and sat down to catch her breath. (Tran at p. 7). She saw Mr. Pranto and then Rosie. (Tran at p. 7). The Claimant mentioned to Rosie that Matt was looking for her. (Tran at p. 7). The Claimant had sat on the bed for just a few

minutes while speaking with a co-worker about what work had been done and where there were beds that

remained to be made. (Tran at p. 9). She sat because she was short of breath. (Tran at p. 7; p. 21). She uses an inhaler. (Tran at p. 21). The Claimant was not discussing personal matters with the co-worker, she was not complaining about work, she was discussing only job-related business. (Tran at p. 9-10).

The Claimant had been written up for absences, for taking too long to do her work, and for insubordination. (Tran at p. 4; Ex. 2; Ex. 4; Ex. 5). The Claimant had absences that were due to her having had a heart attack. (Tran at p. 8-9). The Claimant was terminated for the stated reason of insubordination, because the Employer believed the Claimant was chatting with other housekeepers after allegedly being told not to. (Tran at p. 4; p. 5).

REASONING AND CONCLUSIONS OF LAW:

Background. 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:
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> 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 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). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984). At the same time, where the incidents leading to the final warning do not, even in aggregate, constitute misconduct "the impetus is not thereby provided to elevate the [subsequent] warning or the whole to the status of misconduct." *Infante v. IDJS*, 364 N.W.2d 262, 266 (Iowa App. 1984). In such a case the final act would have to independently constitute misconduct in order to disqualify a Claimant. Conversely, 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".

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 Claimant's testimony in large part because she was the only witness with first-hand knowledge of critical issues in the case.

Past Acts: We recognize that the Claimant does have a significant discipline history. The only proper use of these alleged prior problems would be as background for assessing the seriousness of the final act. In other words, the prior acts could operate as a contributing cause to the termination – by enhancing the seriousness of the final act. But if no final act occurred then, of course, there is nothing to enhance. Had the Employer proven that the Claimant actually did something wrong on her last day we would then take into account the discipline history. But, under the rules and precedent, the only role past acts may have in disqualifying a claimant for benefits is that they be used to enhance the seriousness of a current act. They cannot themselves be the basis of a disqualification. On the final day all the Claimant was doing was talking about issues relevant to the current performance of the job, for a couple minutes with a co-worker. We cannot see how this is even the slightest disregard of the Employer's

interests. Thus there is no final act whose seriousness can be enhanced by the past acts. Misconduct thus is not proved.

In the alternative, there appears to be testimony that the very act of sitting was against the rules (although no one established that this – mere sitting- was actually the reason for the discharge). We cannot say that an employee with a history of heart trouble and who needs to catch her breath wantonly disregards her employer's interests by sitting a couple minutes – even in a guest room. We would conclude this even taking into account the Claimant's discipline history.

No Disqualifying Final Act. The Employer failed to prove that that the final incident, which was the precipitating cause of the discharge, was misconduct. The discharge was thus not caused by misconduct and is therefore not disqualifying. *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" and "an employer must establish that the employer discharged the claimant because of a specific act or acts of misconduct"). We thus find that the Claimant is not disqualified because the final act for which she was terminated has not been shown to be misconduct.

Attendance: We briefly address the question of attendance. In testimony the Employer did not say the Claimant was terminated for attendance. (Tran at p. 6). This is mentioned in the termination letter though. One of the requirements for disqualification is that the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). Absences for personal illness are excused as a matter of law. The Employer did not prove which of the absences were for illness and which were not. As far as we can tell all the absences were for reasonable grounds. Also absences must be properly reported. The Claimant testified she always properly reported her absences. (Tran at p. 8; p. 11; p. 20). The Employer has failed to prove excessive *unexcused* absences, and so even if we were to have found that the Claimant was discharged for absenteeism we would not disqualify her.

DECISION:

The administrative law judge's decision dated September 24, 2009 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 F. Kuester

RRA/fnv