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

JAMODD SALLIS Claimant and **ALPHA SERVICES INC** Employer	**HEARING NUMBER:** 19BUI-07358 **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: 96.5-1, 24.1-113

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer 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:

Jamodd Sallis (Claimant) worked for Alpha Services Inc. as a full-time laborer from April 22, 2019 until July 30, 2019. The Claimant had shown to work for a brief period on August 2 and requested the day off. This was granted by Mr. Cooper, site manager, since things were winding down prior to the week shutdown commencing on Monday August 5.

The Employer's handbook provides that any no call/no show lasting three days is considered job abandonment and results in immediate termination of employment. The Claimant signed for the handbook on April 16, 2019. It was not the Employer's policy or practice to call worker back to work at the end of a layoff.

The Claimant injured his arm at work on July 19, 2019. He was released back to work with light duty restrictions, and the employer accommodated those restrictions. Unrelated to the Claimant's injury, the Employer notified all employees that there would be a facility wide shut down due to a lack of work for two weeks beginning Monday August 5 and ending Friday, August 16. Mr. Cooper gave the Claimant the notice personally on July 30. The workers, including the Claimant, were told to return to work on Monday, August 19, 2019. The Claimant did not show to work on August 19, 20, or 21. The Claimant did not contact the Employer about work until after August 22, 2019. He had by then been separated based on his no-call no-shows.

REASONING AND CONCLUSIONS OF LAW:

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). 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 considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible that the Claimant was personally informed that the layoff would end on August 19 and that he was expect to report back to work as of that day. We do not credit the Claimant's claim that he didn't know he was supposed to be back that day or that he was expecting to be recalled once the layoff ended.

Quit Analysis:

Iowa Code Section 96.5(1) states:

> An individual shall be disqualified for benefits:
>
> > 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Administrative Code 871—24.25 further 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.

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). Under this regulation the Claimant is deemed to have quit by his failure to call in his absences. We have not credited the Claimant's argument that he did not know that he was supposed to report to work as of the 19th. At a minimum the Claimant was no-call/no-show on August 19, 20 and 21. A disqualifying quit under rule 24.25(4) has been shown by the Employer.

Misconduct Analysis

In the alternative to our ruling on quitting, we would also find the Claimant's conduct to be misconduct.

Legal Standards: Iowa Code Section 96.5(2)(a) (2016) 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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final absence which caused the absence was unexcused.

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"). The court has found unexcused issues of personal responsibility such as "personal problems or predicaments other than sickness or injury. Those include oversleeping, delays caused by tardy babysitters, car trouble, and **no excuse**." *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)(emphasis added) *see Spragg v. Becker-Underwood, Inc.* 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003)(In case of disqualification for absenteeism the Court finds that "under Iowa Code section 96.5(2), 'Discharge for Misconduct,' there are no exceptions allowed for 'compelling personal reasons' and we cannot read an exception into the statute"). Here the Claimant only claims that he was confused about returning, and we do not credit this claim. The record thus shows no excuse for the absences, and they are therefore legally unexcused. All of the Claimant's absences from August 19 through August 21 are unexcused under the law.

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the absences were excessive.

The Claimant failed to come into work for three consecutive working days. This is excessive. Absences at a much lower rate of absence have been found to be misconduct. *See Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984)(seven in five months); *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984)(eight in eight months). In *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007) the Court was faced with a claimant who had eight absences over a eight-month period. The claimant argued that of her eight absences most were excused under the law. The Court of Appeal found it unnecessary to address this argument, since three of the absences, over a period of eight months, were unexcused. "[W]e find the three absences constitute excessive unexcused absenteeism." *Armel* slip op. at 5. Here the rate of absences is higher than in *Armel* and the total equals the absences in *Armel.* The same is true of *Hiland v. EAB*, No. 12-2300 (Iowa App. 7/10/13) where excessive absenteeism was found for three unexcused absences over seven months. The rate of absences here is higher than in *Hiland,* and the total is the same as in *Hiland.* Since the rate of unexcused absences exceeds that in these cases we feel confident in concluding that the Claimant's unexcused absences were excessive.

As an independent alternative to our quit analysis we find that the Claimant is disqualified based on his discharge for excessive unexcused absences.

The Employer 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 the Employer 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.

DECISION:

The administrative law judge's decision dated October 10, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was separated from employment in a manner that disqualifies the Claimant from benefits. Accordingly, he is denied benefits until such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code §96.5(2)"a"; §96.5(1)"g."

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

_____

Kim D. Schmett

James M. Strohman

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

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.

_____
Ashley R. Koopmans

RRA/fnv