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

PRISCILLA B SANTOS	:	
	:	**HEARING NUMBER:** 16B-UI-03209
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
KOHL'S DEPARTMENT 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: 96.5-2-A

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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Priscilla Santos, worked for Kohl's Dept. Stores, Inc. from February 4, 2015 through February 13, 2016 as a part-time point of sale associate. (*6:56-7:36; 11:50-12:08) The Employer has a no fault point system attendance policy. (3:16; 3:22; 4:04-4:13) A full day's absence is one point; a tardy is a ½ point. (3:50-3:59) If an employee accumulates 12½ points within a rolling 12-month period, that employee is subject to termination. (3:27-3:37) The Claimant signed in acknowledge of understanding and receipt of this policy at the time of her hire. (3:40-3:46) The Employer allows employees six minutes leeway before considering an employee tardy. (10:14)

The Claimant accumulated several points for absences and tardies, one of which she was a no call/no show on March 15, 2015. (5:08-5:12; 12:36) Ms. Santos had difficulty keeping up track of her schedule, and the

Employer assisted her in making copies. (13:16-13:50; 14:16-14:37; 15:30-15:47; 16:50-17:05; 17:58-18:30) On March 27, 2015, the Employer issued a written warning to the Claimant for having accumulated three points, as well as counseled her about their attendance policy for which the Claimant acknowledged her understanding of it, but offered no explanation for her numerous tardies. (5:16-5:37; 15:35-17:41)

She continued to have attendance issues (5:39-6:54), which resulted in her receiving a final written warning on September 10, 2016 for nine occurrences. (6:56-7:07; 7:57; 10:50-10:55; 20:05-20:08) The Employer reviewed the attendance policy, again, with Ms. Santos, who acknowledged understanding the policy, but had no explanation for her attendance. (7:58-8:05; 15:35-17:41) The Claimant received several additional tardies throughout the months of November, December and January, in which she had accumulated 12½ points, the last two points involved two no call/no shows (January 5th and 28th). (8:25-8:55; 12:36) The Claimant was not scheduled to work again until February 13, 2016 (9:19-9:21), at which time the Employer terminated Ms. Santos for excessive tardiness (3:10-3:18: 12:22-12:30)

(* 1st recording of 14:21 minutes)

REASONING AND CONCLUSIONS OF LAW:

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).

871 IAC 24.32(7) 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.

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 attribute more weight to the Employer's version of events. Generally speaking, exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct. See, Cosper, supra. v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. See also, Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. However, in the case at hand, the Claimant admitted to having only one absence attributed to sickness (21:19-21:24), but there was no evidence adduced to establish that this absence was properly reported. Even assuming arguendo that the Claimant had one excused absence, it is clear that it was not the final absence that led to her termination. Rather, given her extensive record of tardies, coupled with three no call/no shows (two of which occurred in January), we can justifiably determine that Ms. Santos demonstrated a pattern of disregard for the Employer's attendance policy and the standards of behavior the Employer had a right to expect of her. See, 871 IAC 24.32(1)"a".

Both parties agree that the Employer tried to work with Ms. Santos on keeping track of her schedule. Yet, she continued to have difficulties. She received written warnings as well as additional counselings on the policy, and knew her job was in jeopardy. Evidence of her casual attitude towards being on time and reporting to work is further established when she testified that she was "…just tired…" when questioned about why she was tardy so often the last few months of her employment. (20:50-20:53) Based on this record, we conclude that the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated April 6, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying reasons. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv