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

COLE M COPIC	:	
	:	**HEARING NUMBER:** 21B-UI-03390
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
D OF S FOODS 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, 24.32-7

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 Administrative Law Judge's findings of fact are adopted by the Board as its own.

In addition, the Board finds: The Claimant has earned at least $6,230 in covered wages since the date of his separation with this Employer. The Claimant's weekly benefit amount on this claim is $129.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards:

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

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. *Higgins v. IDJS*, 350 N.W.2d 187, 190 (Iowa 1984).

Unexcused:

The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final issue which caused the discharge 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"). Where the Employer shows that there was no excuse given at the time of the absence or tardy and none appears in the record of the hearing then that absence or tardy is not for an excused reason.

Here the Claimant's first absence was no call/no show and so was not excused because it was not properly reported. His second tardy was for unidentified reasons. Employers have the burden of proving misconduct, and yet are often in the position of not being able to give the exact reason for tardiness and absences. In the context of whether it was misconduct to miss work after having a leave request denied the Court has held the "it was appropriate for the agency to consider only the information available to the employer..." *Spragg v. Becker-Underwood, Inc.* 672 N.W.2d 333, 2003 WL 22339237*3 (Iowa App. 2003); *c.f. Norland v. IDJS*, 412 N.W.2d 904, 910-11 (Iowa 1987)(Once Employer makes prima facie showing of suitable offer Claimant must put into issue alleged inadequacies). In *Spragg* the time off was, according to the claimant, for a sick child, but the claimant did not share specifics with the Employer. The *Spragg* court thus found it was appropriate to decide whether the absence was excused based on the information the Employer had. *Higgins* as noted included as excused those absences occurring because of "no excuse." Here the Employer's information shows no reasons for the final tardiness. The Claimant gave none to the Employer and did not appear at hearing. Under *Spragg* and *Higgins* we find this final incident to be unexcused.

Excessiveness:

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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); *see 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). We recognize that two unexcused absences is not very many. But it was two in a row, and during the first week of employment. Under the circumstances of this case we find this sufficient to be misconduct. Nor is the lack of warning dispositive. The Claimant left early his first two days (with permission apparently so we do not count this towards his misconduct), and then missed a day without notice, and then he was late his final day. The Employer hardly had a chance to give him a warning. Besides, it was reasonably foreseeable to a prudent person that missing work like this in the first week would result in job separation. Benefits are denied.

Ruling Has No Adverse Effect on Claimant

Since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

Furthermore, although the discharge is disqualifying, the disqualification is only in effect until the Claimant requalified. The requalification period runs from the date of the separation. "In order to meet the ten times the weekly benefit amount in insured work requalification provision, …the individual shall have worked in (except in back pay awards) and been paid wages equal to ten times the claimant's weekly benefit amount." 871 IAC 23.43(8). As we have found the Claimant was fired back in the second quarter of 2020. He has since then earned at least $6,230 in covered wages with other employers. This is more than ten times his weekly benefit amount.

The Claimant has thus requalified for benefits. **Benefits are allowed from this date forward even though the April 2020 separation was disqualifying**. **The Employer shall not be charged** for any benefits that have been or will be paid. *See* Iowa Code §96.7(2)(b).

DECISION: The administrative law judge's decision dated March 15, 2021 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct, but the Claimant has since that time requalified for benefits. Since this requalification predates today's decision, and since no overpayment can be assessed, the claim **shall not be locked** as a result of the separation with *D of S Foods, Inc*. Of course, *D of S Foods, Inc* **will not be chargeable** for benefits paid on this claim, nor will it be chargeable for benefits paid in the future on a subsequent benefit year claim, if any were to be filed.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

We note for the parties that the upshot of today's decision is to relieve the Employer of charges for benefits the Claimant has collected, or may collect in the future. There is no adverse effect on the Claimant. He owes no overpayment, and his claim is not locked at this time because of his requalification.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv