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

DEANNA R HARRIS Claimant and **LACOSTA INC** Employer	:	**HEARING NUMBER:** 17BUI-09938 **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, 96.3-7

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.

REASONING AND CONCLUSIONS OF LAW:

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).

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.

The Claimant's June 1 tardy, is unexcused because it was not properly reported and because no reason was given. The attendance incidents of May 2, May 9, May 10, May 12, May 22, May 23, May 25, May 26, May 29, and May 30 are all for no identified reason. 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 incidents we have identified. The Claimant gave none to the Employer and did not appear at hearing. Under *Spragg* and *Higgins* we find all these incidents to be unexcused. The May 18 excuse may be regarded as insufficient under *Higgins*, but for our purposes today we will excuse it. Other excuses for lack of daycare, which are not detailed in the record but appear only generally, would not be for excused reasons under the precedent.

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the absences were excessive. 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). 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). Specifically, "[h]abitual tardiness, particularly after warning that a termination of services

may result if the practice continues,

is grounds for one's disqualification." *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984)(quoting *Spence v. Unemployment Compensation Board of Review*, 48 Pa.Cmwlth. 204, 409 A.2d 500 (1979). Here the Administrative Law Judge found that since the Employer had tolerated absences after its April warning then the Claimant was not on notice of the need to come to work on time. First of all, any worker in jobs of this nature knows to come to work on time. A janitor job is not an "on call" or "as needed" position. Further, the Employer had made the Claimant aware that she was expected to come into work on time both in its policies and its warning in April. Finally, the Employer did warn the Claimant on May 18, and on May 25. We conclude that no reasonable person could mistake the Employer's forbearance as *carte blanche* to come late to work, leave early, or to skip work. The Claimant knew what was expected of her, and we find she was aware that her absences were not excused and she was aware that discipline, including discharge, was a reasonably foreseeable result.

By our count the Claimant had unexcused attendance issues eleven times in just under a month. This is clearly excessive.

The Courts have found lesser absenteeism to be excessive. In *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984), Ms. Higgins had seven unexcused absences in five months. The Claimant had more attendance issues in much less time. In *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984) the record showed five absences and three instances of tardiness – the last two being for three minutes and one minute late - over eight months. *Infante* at 264, p. 267. This was "sufficient evidence of excessive unexcused absenteeism…to constitute misconduct." *Infante* at 267. Again the Claimant here had more issues in much less time. 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 an 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 <u>three</u> 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 is again much higher than in *Armel* and the total greatly exceeds 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. In *Clark v. IDJS,* 317 N.W.2d 517 (Iowa App. 1982) the claimant was warned over absences, and then missed three more times. Again this case is worse. Following the May 18 warning the Claimant had six more issues. Even following the May 25 warning she had three more – just as in *Clark.* Here the Claimant's history, similar to that in *Higgins, Infante*, *Armel, Hiland,* and *Clark* shows unexcused absences, departures, and tardiness. Since the rate of unexcused issues exceeds that in these cases we feel confident in concluding that the Claimant's unexcused attendance violations were excessive. She is accordingly disqualified.

<u>Note to Claimant :</u> The procedural aspects of this case are a little odd. The Claimant did not attend the hearing. We do not know if the Claimant had a legally sufficient excuse for not attending since she has filed no argument with the Board. We recognize, of course, that until today the Claimant had prevailed and thus has no reason to try to explain the absence at hearing. We point this out now so that the Claimant is explicitly aware of the ability to apply for rehearing of today's decision within 20 days of issuance of today's decision. The Claimant may make whatever argument for reopening that the Claimant thinks appropriate, and this would include argument explaining why the Claimant failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is <u>not</u> flexible and may not be extended.

No Overpayment: Finally, 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.

DECISION:

The administrative law judge's decision dated October 16, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv