

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

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**LEHYAYEALEA GWEH**

Claimant

and

**SWIFT PORK COMPANY**

Employer

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**HEARING NUMBER: 17BUI-01671**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**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

**DECISION**

**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. 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:**

Lehyayealea Gweh (Claimant) worked as a full-time production worker for Swift Pork Co. (Employer) from May 14, 2012 until she was fired on January 20, 2017.

The Employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. If an employee is going to miss work, they are to contact the employer at least thirty minutes prior to the start of their shift.

Claimant was absent from work on January 13 and 14, 2017; however, she provided the employer with a doctor's note that excused her from work from January 1, 2017 through January 15, 2017 for medical reasons. Although the Claimant did not call in on January 14, this was due to side effects of her medication.

Once the Claimant was absent on January 14, she had reached her maximum points and the Employer decided to terminate her. The Claimant was terminated for reaching her maximum points as of January 14. While the Employer mentions the Claimant's absence from January 16, the fact is the Employer had already decided to terminate the Claimant once she missed work on the 14<sup>th</sup>. Any absence on the 16<sup>th</sup> has not been proven to have been a causal factor in the decision to discharge.

### **REASONING AND CONCLUSIONS OF LAW:**

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)(emphasis added); *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 excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984). Second the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). 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”). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused for reasonable grounds. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984). The determination of whether an absence is unexcused because not based on reasonable grounds does not turn on requirements imposed by the employer. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). Improperly or late reported absences will be deemed excused absences if the employee’s failure to timely report the absence was due to incapacity or to the illness itself. *See Roberts v. Iowa Dept. of Job Services*, 356 N.W.2d 218 (Iowa 1984); *Floyd v. IDJS*, 338 N.W.2d 536 (Iowa App. 1983).

While the Claimant has a number of other attendance issues, we do not need to address how many of those are excused under the law. We find that the final absence was not proven to be unexcused. As we have found the absence on the 14<sup>th</sup> was for properly reported absence due to illness. This is excused under the law. The Claimant did apparently miss on the 16<sup>th</sup> but by that time the decision to terminate had been made. Post-decision events will not support a finding of misconduct. *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991); *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 669(Iowa 2000). The Employer, when asked “When was the final incident that led to discharge, when did that occur?” responded “It occurred on January 14, 2017.” We have found that the discharge decision was made once the January 14 absence occurred. The *Lee* case instructs that we may not discharge for an event that “occurred after the last incident that gave rise to the employer’s decision to discharge...” *Lee* at 669. We thus disregard the January 16 absence. The final absence that caused the discharge is a legally excused absence.

Thus even assuming the Claimant’s history of unexcused absences is excessive, the final absence was not proven to be unexcused, and thus the final absence cannot justify a

disqualification. This is because the final absence has not been proven to be other than properly reported and for reasonable grounds, and thus

the Employer has not proven that the termination was for a *current act* of misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). In addition, where the precipitating cause of the discharge is an excused absence the discharge is 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”); *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 669 (Iowa 2000) (incident occurring after decision to discharge is irrelevant). Even assuming the history of the Claimant’s absences/tardiness is unexcused, the final incident, without which no termination would have occurred, was not proven to be unexcused under the law and thus that final absence cannot support a disqualification. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007); *Gimbel v. EAB*, 350 N.W.2d 192 (Iowa App. 1992); *Roberts v. Iowa Dept. of Job Services*, 356 N.W.2d 218 (Iowa 1984); see generally *Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982).

#### DECISION:

The administrative law judge’s decision dated March 10, 2017 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. The overpayment entered against claimant in the amount of \$2,740 is vacated and set aside.

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Kim D. Schmett

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Ashley R. Koopmans

RRA/fnv

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James M. Strohman