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

CAMERON LYONS	:	
	:	**HEARING NUMBER:** 20B-UI-04961
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
TYSON FRESH MEATS 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: 96.5-1, 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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:

Cameron Lyons (Claimant) worked as a machine operator in the pork department for Tyson (Employer) in Council Bluffs from October 28, 2019 until he was fired on March 16, 2020. The Claimant worked full-time on the second shift.

The Claimant received information a warrant had been issued for his arrest. He told his supervisor he would likely be arrested. The Claimant was arrested on March 12, 2020 in Omaha.

The Employer considered that the Claimant was a no call, no show at Tyson on March 12, 2020, March 13, 2020, and March 16, 2020.

Tyson considered Claimant had abandoned his job. Chappelear pulled the inmate list for Douglas County, Nebraska and confirmed the Claimant was incarcerated on March 16, 2020. On March 16, 2020, the Employer sent Claimant a letter indicating Tyson considered he abandoned his job by not attending work or calling Tyson for three days. Claimant had not missed any work for Tyson before his arrest and incarceration.

When Claimant arrived at jail he was afforded one telephone call. He did not have his wallet while in jail, as he was not allowed to take anything with him when he was taken into custody. The Claimant thus did not have with him in the jail the card with the Tyson number he had to call to report an absence. He asked a jail employee to look up a number for the Employer and she found a general number. The jail employee then dialed the number, and the Claimant spoke with a woman whom he told he was going to be absent. She indicated she would inform management. Once processed in the jail the Claimant could only make collect calls. He attempted again to call Tyson but Tyson does not accept collect calls. The jail would not allow him to call an 800 number.

The Claimant was released from jail. After his release the Claimant called the Employer asking for reinstatement but was declined.

The Claimant received Chappelear's March 16 letter and mailed a copy of her letter to Tyson with a response stating he had been incarcerated and he should not have lost his job. The Claimant sent a copy of Chappelear's letter with his response to Tyson on March 24, 2020, March 27, 2020, and March 28, 2020.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2020) 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).

Irving v. Employment Appeal Bd., 883 NW 2d 179 (Iowa 2016) makes two things clear about jail cases. First of all, merely being incarcerated is not a *voluntary* quit. We do not think a three day no call/no show rule changes this result. Thus we must analyze this as a termination case. Second, *Irving* makes clear that incarceration is reasonable ground for missing work in cases where the charges are dismissed. Since this Claimant was fired for attendance violations and since charges were dismissed, he had reasonable grounds for missing work. There remains, then, only whether the absences were properly reported.

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 the testimony from the Claimant about his calls to the Employer, and what he told the Employer during the calls.

We find that the Claimant sufficiently reported the absences. The Claimant told his Employer that he was going to be arrested and incarcerated. He did call when incarcerated to the only number he could find. Moreover, the Employer checked the inmate list on the *first day* Claimant missed, and saw that he was in jail. The Employer was thus on notice that the Claimant was incarcerated and, obviously, could not say when he was to be released. He was meanwhile dealing with very serious legal issues. In general, 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). Here the incarceration necessarily limits the Claimant's freedom to communicate with the Employer. The bottom line is that the Employer did get notice which was reasonable under the circumstances and the final absences are thus excused under the law. *See Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536, 538 (Iowa App., 1983) ("His employer knew that he was ill, and had fair warning that petitioner might be absent for an extended period of time due to that illness.").

Thus even assuming the Claimant's history of absences is excessive, the final period of absence was excused, and thus the final absences cannot justify a misconduct disqualification. This is because the final absences have 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 g*enerally, 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). The final incidents, without which no termination would have occurred, were not unexcused under the law and thus those final absences 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).

We now come to the statutory reaction to *Irving.* Iowa Code Section 96.5(11) (2020) provides:

> 96.5 Causes for disqualification.
>
> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 11. Incarceration — disqualified.
>
> a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds **all** of the following:
>
> (1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.
(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.
(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Code section 96.6(2) provides:

The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to **produce evidence showing that the claimant is not disqualified** for benefits in cases involving section 96.5, subsections 10 and **11**,….

Under these statutory provisions once the evidence shows that the Claimant became separated from employment due to the Claimant's incarceration the Claimant must produce evidence on the whether the four conditions for avoiding incarceration disqualification are met.

The evidence establishes that the Claimant did tell the Employer about the pending arrest prior to his incarceration. He also called while in jail, but not to the officially correct number. We think this satisfies the prior notice requirement. The "purpose of our unemployment compensation law is to protect from financial hardship workers who become unemployed through no fault of their own" the courts "are to construe the provisions of that law liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Employment Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). As a corollary, the courts **"**are to interpret strictly the law's disqualification provisions, again with a view to further the purpose of the law". *Id.* In construing the act the Court "must keep in mind the beneficial purposes of the Act, [the p]recedent that the employer has the burden of proof regarding misconduct, and [the p]recedent that the disqualification provisions of the Act are to be strictly construed against the employer." *Irving v. EAB, 883 N.W.2d 179, 193 (Iowa 2016)*). We recognize that these principles do not overcome the literal terms of the statute. *Moulton v. Iowa 't Sec. Comm'n*, 239 Iowa 1161, 34 N.W.2d 211, 216 (Iowa 1948)(In unemployment cases "[w]hile the statute under consideration is to be liberally construed in order to effect its beneficent purpose, yet construction should not be carried beyond the limits of its plain legislative intent."). But even literal terms do not normally require the impossible. Thus the law has been for centuries that "there is no obligation to perform impossible things." *E.g. Cryer v. M & M Manufacturing Company, Inc.*, 273 So. 2d 818, 830 (La. 1972)(citing sources as far back as second century AD for proposition that "impossibilium nulla obligatio est"); *Green v. Liter*, 12 U.S. 229, 246 (1814)("the law does not compel one to do vain or impossible things.") True, state laws often provide that an incarcerated individual has a right to some number of phone calls and this can allow a worker to notify his employer. *See State v. Garrity*, 765 N.W.2d 592, 596-97 (Iowa 2009). But the Claimant did the best he could, and we do not think the statute requires the worker to more than the incarceration itself would reasonably allow.

Meanwhile, the Claimant did report back and he was not hired. The evidence does not firmly establish *how long after release* the Claimant contacted the Employer to let it know he was released. The Employer puts the first letter date as March 24, but there is not firm testimony on when the Claimant was released. Normally, we would remand the matter for the date of release. (We note that https://inmate.watch/details/71309/ shows a release date on April 1, although we do not rely on this in making our decision.) However, the Claimant was terminated prior to even being released. *And* he knew he got the letter of termination as soon as he got home from jail. Under the circumstances the purpose of the reporting back requirement was satisfied. *Porazil v. IWD*, No. 3-408 (Iowa Ct. App. Aug. 27, 2003). The Claimant's evidence also establishes that the charges that led to his termination were dismissed. Ultimately, what happened here was the Claimant told the Employer he was probably going to get arrested, he did get arrested, he did the best he could to inform the Employer where he was, the Employer in fact knew where he was, the Employer fired him before he was released, when released he tried very hard to get his job back, and then the charges were dismissed. Misconduct was not shown, and the Claimant did satisfy the conditions of Iowa Code §96.5(11).

DECISION:

The administrative law judge's decision dated July 1, 2020 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.

_____
Ashley R. Koopmans

_____
James M. Strohman

_____
Myron R. Linn

RRA/fnv