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

SCOTTIE D CARPENTER

Claimant

and

CARGILL MEAT SOLUTIONS

Employer

HEARING NUMBER: 16B-UI-04156

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

D E C I S I O N

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Scottie Carpenter (Claimant) worked as a full-time rack push/pull worker for Cargill Meat Solutions (Employer) from March 17, 2015 until he was fired on March 13, 2016. The Employer fired the Claimant on March 13, 2016 because the Claimant had received points for attendance policy violations that were in excess of those necessary to be terminated. The record does not reveal whether the Employer excused illness, nor any details on the various instances of attendance violations which were reported only as "unplanned."

On March 6, 2016 the Claimant was one minute late when clocking in when returning from break at 10:30. The time clock would advance to the next minute once the minute mark was passed, thus treating 10:30 and ten seconds as 10:31. The cafeteria clock was frequently off from the time stated when the Claimant would clock in at the time clock. This contributed to his late clock in.

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); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)…accurately states the law").

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).

The requirements for a finding of misconduct based on absences are 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).

The Employer has made it difficult on itself by neither appearing at hearing nor even submitting argument on appeal. Yet even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer]). Defaults are limited to nonappearance by an appealing party. 871 IAC 26.14(7). Thus judgment is not automatic when a respondent with the burden of proof fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

We conclude that the Employer has failed to prove misconduct because the Claimant's final tardy was not shown to be unexcused. According to the only evidence in the record the time clock would stamp to the next minute if the Claimant clocked after the turn of the minute, thus a clock in at 3:00:10 was stamped as 3:01. Add to this the inaccurate clocks, and a failure to clock in at the exact minute is not misconduct, and is not even an instance of tardiness. If we counted it as tardiness, we would consider it excused for reasonable grounds and proper reporting. Even assuming the Claimant's history of unexcused absences is excessive, the final tardy was not unexcused, and thus the final tardy cannot justify a disqualification. This is because the final absence has not been proven to be other than an excused absence, 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). Even assuming the history of

the Claimant's absences/tardiness is unexcused, 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).

In the alternative, even counting the final tardy as unexcused there is just not sufficient proof of a history of unexcused absences. The exhibit has scant detail on the reasons for the absences and tardies. For example, an "unplanned" absence tells us nothing about whether an absence is excused. A serious medical emergency which would normally be excused would also normally be described as "unplanned." We need a lot more than the characterization of "unplanned." Neither the exhibits nor the testimony gives us any reliable record on whether the various infractions were excused under the law. This being the case the Employer simply hasn't shown a history of excessive unexcused absences and tardies by the Claimant. For this independent reason we would also find that misconduct has not been proven by the evidence in the record.

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

DECISION:

The administrative law judge's decision dated April 27, 2016 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.

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Ashley R. Koopmans

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James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety. I find insufficient evidence of clock inaccuracy to overcome the documentary evidence of excessive attendance violations.

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Kim D. Schmett

RRA/fnv