BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
Website: eab.iowa.gov

THOMASINA D HUNTER

Claimant

and

BETTENDORF HEALTHCARE MGMT

Employer

: **APPEAL NUMBER:** 23B-UI-06870
: **ALJ HEARING NUMBER:** 23A-UI-06870
:
: **EMPLOYMENT APPEAL BOARD DECISION**
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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

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:

Thomasina Hunter (Claimant) worked for Bettendorf Healthcare (Employer) as a full-time certified nursing assistant (CNA) from April 13, 2022 until she was fired on June 12, 2023. The Claimant's supervisors were the Assistant Director of Nursing, Amanda Hinton ,and the Director of Nursing Kimberly Dominguez. The Employer has a policy that a worker could not be on a cell phone in the facility with residents in the vicinity. Further the Employer requires that an employee may not take a break without permission from their supervisor. The Claimant was given a handbook with these policies when she was hired.

Claimant was issued a disciplinary warning for personal phone use in front of a resident on February 28, 2023. The discipline included a warning that further infractions of this nature could cause further discipline up to and including termination. On March 1 the Claimant was disciplined for failure to clock out when leaving the facility for break.

Claimant had a received a final written warning on June 8, 2023, after she had been suspended pending investigation into attendance issues. The June 8, 2023, warning told Claimant that any policy violation in the future could result in her discharge. The Claimant was 75 minutes late to work on June 2. She had been more than 10 minutes late fourteen times between May 8 and June 2. She was scheduled 18 times in this period. She was 75 minutes late on June 2 despite telling the third shift nurse she would only be a few minutes late. Included in the warning was the fact that the Claimant sometimes left work before end of shift. The June 8 warning including a warning that the Claimant could be fired if the issues reoccurred within the next 60 days.

On June 9, 2023, Claimant's shift began at 7:00 a.m. Around 8:05 a.m., DON Dominguez was entering the building when she saw claimant in her car talking on the phone. DON Dominguez was concerned because the Claimant would not be on break at that time since it was breakfast service time. DON Dominguez approached Claimant and asked if everything was well. Claimant told her that she had to take the phone call. The Claimant did not describe an emergency. DON Dominguez told the Claimant that the residents in the building were awaiting feeding assistance, and Claimant responded that there were three other staff present, and that she needed to take the call. The Claimant gave no further information on the call. Claimant exited the car and walked to the building, still on the phone. She entered the building and continued to be on the phone. The Claimant had not received permission to take a break from her supervisor.

On June 12, 2023, Dominguez discharged claimant because she had taken an unauthorized break and had been on a personal phone call in the facility after having received a final warning on June 8, 2023.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5 provides:

> *2. 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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> a. The disqualification 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.
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> ….
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> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 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. Misconduct by an individual includes but is not limited to all of the following:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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); Iowa Code §96.6(1). 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 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 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). Tardiness is also explicitly included in Iowa Code §96.5(2)(d).

As noted, the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. In consonance with this, 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); *accord 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).

Under the precedent "absenteeism arising from matters of purely personal responsibilities" are not excused. *Harlan v. IDJS*, 350 N.W.2d 192, 194 (Iowa 1984)(late bus)(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"). Similarly, the *Higgins* Court found unexcused "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).

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). We also note that the three Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. 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 Employer's testimony concerning the Claimant's prior discipline, her employment history, and the facts surrounding her termination. Where the Claimant and the Employer disagree, we find the Employer more credible.

The Claimant here had a terrible attendance record and offered no explanation when the Employer asked her about it in June. She had a history of tardiness for which no excuse was offered. Obviously fourteen tardies in a month (18 shifts) is excessive, and it still was excessive when the Claimant took the unauthorized break the day after her final warning. The Employer thus established excessive unexcused absenteeism.

The Claimant received a warning about cell phone use in February, and this was followed by a final warning on June 8. The *next day* the Claimant took an unapproved break during the time that residents were to be fed. Further she continued to speak on her phone while in the facility. While the duration of the call may have been short, the Claimant was on a final warning. The brevity of some of the prior tardiness, as well as the final unauthorized break, is not controlling in these circumstances. 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, and the Court of Appeal disqualified as a matter of law. In *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984), Ms. Higgins was late by only 15 minutes when she was fired over it. Here the Claimant had a remarkable incidence of tardiness, was on a final warning, and then took an unauthorized break very next day. And she did it while using the phone, which she continued to use on the facility despite a prior warning. The Claimant attendance history, and her prior

discipline, is comparable or worse than in the precedent. *See Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984) (seven unexcused absences in five months); *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984) (5 absences and 3 tardies in 8 months); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007)(3 unexcused absences in 8 months); *Hiland v. EAB*, No. 12-2300 (Iowa App. 7/10/13)(three unexcused absences over seven months); *Clark v. IDJS*, 317 N.W.2d 517 (Iowa App. 1982). We conclude that the Employer has proven misconduct.

DECISION:

The administrative law judge's decision dated July 31, 2023 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, Claimant is denied 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.

The Board remands this matter to the Iowa Workforce Development, Benefits Bureau, for a calculation of the overpayment amount based on today's decision.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv