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

GEORGE W BERGESON Claimant and **SLB OF IOWA LC** Employer	:	**HEARING NUMBER:** 17BUI-10129 **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, 24.32-7

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 Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following modifications:

The Employer has a progressive disciplinary policy regarding attendance in which three tardies will result in termination within a certain time period. (11:20-11:52)

The Claimant understood that his work schedule was from 7:00 a.m. until 3:00 or 4:00 p.m., Monday through Friday. (24:20-24:30) He did not call in to report his tardies, as he knew the Employer expected him after 7:30 a.m. (35:30-35:40) The managers at the café had issued several verbal warnings to Mr. Bergeson, but his tardiness persisted. (18:24) The Employer (via Allison Andrews) even offered to change his schedule to accommodate his 'after' 7:30 arrival, but he merely reiterated that the Employer knew when he would be at work. (33:50-34:10; 39:37-39:45; 43:48-44:20)

Mr. Bergeson's ongoing tardiness problem came to the District Manager's attention in early September of 2017. (12:30-12:40; 18:07-18:24) The District Manager sent a mandate to the managers regarding its intention to start enforcing the existing attendance policy. The managers, in turn, communicated this mandate to all team members, which included Mr. Bergeson. (10:28; 11:07; 12:41-12:46) Ms. Andrews, specifically, told the Claimant he had only 15 minutes leeway after his 7:00 a.m. start time beginning the week of September 11th, 2017. (42:21-43:23; 51:13-51:41; Exhibit 1-unnumbered pp. 6 & 7) The first day this enforcement took effect, the Claimant was over 15 minutes late and was issued a written warning that he did not sign because he had customers and told the Employer she knew he came in after 7:30 a.m. (35:55-36:07)

The Employer discharged the Claimant for repeated tardiness after several verbal and written warnings. (12:08-12:15)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993).

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).

871 IAC 24.32(7) 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.

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. We attribute more weight to the Employer's version of events. The record establishes that up until mid-September of 2017, the Employer had an established attendance policy that was not strictly enforced. However, once the Employer put all employees on notice of the Employer's renewed enforcement of that policy in early September, the Claimant continued to report to work more than a ½ hour after his 7:00 a.m. scheduled time. The Claimant's response that "…[he] came in everyday about the same time…" and that the Employer knew it, does not absolve him of his responsibility to abide by the Employer's attendance policy; neither does his argument that nearly all the employees routinely came in late mitigate his behavior given the Employer's mandate to enforce the attendance policy, which put all employees, including the Claimant, on notice that their jobs may be in jeopardy if there was no compliance.

The Claimant's denial of receiving the Employer's text messages lacks merit even if we were to believe he never received them. He admitted at one point that Ms. Andrews specifically told him he had a 15-minute leeway, which he still failed to adhere to. Additionally, the Claimant admitted receiving prior warnings, as did other employees, but not just for tardiness. (37:27- 37:30) And although the Claimant contends he had no clue his job was in jeopardy, we find his testimony not credible in light of his admission.

We find the Claimant's reluctance, and ultimately, his refusal to change his start time when given the opportunity tantamount to insubordination when he insisted, essentially, that there was no need since the Employer knew when he came to work. The Employer has a right to expect its employees to abide by its policies, including attendance in order to maintain good business practices and morale in the workforce. While we sympathize with the personal issues the Claimant recently experienced, there is nothing in the record to support that his tardies were, in fact, tied to those issues such that the Employer may have considered them as excused on September 12th-14th, particularly in light of his recent warnings. Based on this record, we conclude that the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated October 25, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Employer submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Employer was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv