IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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DIA APPEAL NO. 20IWDUI0033
IWD APPEAL 20A-UI-01537-B2-T

ADMINISTRATIVE LAW JUDGE DECISION

REQUEST TO REOPEN AND APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the mailing date below the administrative law judge's signature on the last page of the decision, you or any interested party:

(1) Appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.
A reference to the decision from which the appeal is taken.
That an appeal from such decision is being made and such appeal is signed.
The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(2) **OR YOU MAY** Make a request to reopen the hearing to the Appeals Bureau directly to:

Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax: (515) 478-3528

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

ONLINE RESOURCES:
UI law and administrative rules:
https://www.iowaworkforcedevelopment.gov/unemployment-insurance-law-and-administrative-rules
UI Benefits Handbook:
https://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-handbook-guide-unemployment-insurance-benefits
Forms for Employers: https://www.iowaworkforcedevelopment.gov/employerforms
Employer account access and information: https://www.myiowaui.org/UITIPTaxWeb/
National Career Readiness Certificate and Skilled Iowa Initiative: http://skillediowa.org/

IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRETTE HOPKINS Claimant **KD HONGO LLC** Employer	**DIA APPEAL NO. 20IWDUI0033** **IWD APPEAL 20A-UI-01537-B2-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 1/26/20** **Claimant: Respondent ( )**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On February 19, 2020, Claimant Brette Hopkins filed an appeal from the February 17, 2020 (reference 01) unemployment insurance decision that determined she was not eligible to receive unemployment insurance benefits because she was discharged for repeated tardiness after being warned. A telephone hearing was held on April 13, 2020. The parties were properly notified of the hearing. Employer failed to appear at or otherwise participate in the hearing. Claimant Brette Hopkins did appear and testify at the hearing. Carmalita Hawkins from the Unemployment Help Center also appeared as her representative. Official notice was taken of the administrative file that was supplied along with this case, including the documents from the fact-finding interview.

ISSUE(S):

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Claimant Brette Hopkins worked for her employer, the Mellow Mushroom restaurant in Coralville, as a part-time closing server. Claimant's first day of employment was May 5, 2017. The last day claimant worked on the job was January 29, 2020. Claimant's immediate supervisor was general manager Joseph Burillo. Since she started she has never worked a weekend due to her religious persuasion and she typically does not work on Wednesdays either.

In the Fact-Finding Worksheet for Discharge, Burillo claimed that he discharged claimant on January 29, 2020, due to tardiness. He claimed that she was scheduled to work on that day, which was a Wednesday, but that she showed up fifteen minutes late and said she was not able to work due to a bad hip. Burillo also claimed that claimant had also been tardy on January 14, 16, 17, 21, 23, 26, 27, and 28. Additionally, he stated that claimant had missed a scheduled staff meeting on December 7, 2020, and had been placed on a 90-day probation in October of 2019 for attendance issues.

Burillo also submitted as part of the fact finding process several Employee Warning Notice forms purporting to show claimant's attendance issues. These are dated and provide as follows:

- September 24, 2019 – scheduled to start at 10:45 a.m. but called at 3:00 p.m. saying she slept in
- October 7, 2019 – says she was a no-call no-show for a weekend shift and 30 minutes late on Friday
- January 27, 2020 – missed staff meeting on 1/26/20
- January 29, 2020 – scheduled to start at 11:30 a.m. but came in at 11:45 asking for paycheck

These forms all purport to have been signed by both the claimant and her supervisor. However, claimant now maintains that she was never presented with any of these forms, that she never signed them, and that somebody forged her name on them. It is interesting to note that her "signatures" on these forms are just her first name, and not hear last name. At least one of them (the 10/7/19 form) looks distinctly different from the rest of them, showing that it was likely signed by somebody different than the person who signed the rest of the forms. And, the remainder of the first name signatures do not appear to match the claimant's signature as submitted one of her exhibits, where her full name (first and last) was signed. Finally, most of the handwritten dates on the supervisor and employee lines appear to have been written by the same person, implying that a supervisor and claimant did not separately write in the dates next to their signatures, but rather that a single person wrote on both of the date lines. Based on all these inconsistencies, I as a matter of fact find that the claimant did not sign her name to these form and that she was never provided a copy of them.

The file also includes what appears to be a portion of the Mellow Mushroom employee manual. The section on tardiness provides as follows:

> Employees must be prepared to start work promptly at the beginning of each shift. Always arrive at the restaurant 10 to 15 minutes before your shift. Your scheduled time is the time you are expected to be on your job, and not the time that you arrive at the restaurant. Repeated tardiness is grounds for termination. If you are not able to arrive for work at your scheduled time, call the restaurant to speak to the manager.

Claimant admits she received this employee manual upon her hire. However, she claims that she has always had a "grace period" of sorts that provides they are allowed to clock in up to five minutes after their scheduled start time. And, she submitted clock receipts showing when she clocked in and out on several of the days on which Burillo claimed she was tardy. Her usual start time was 11:30 a.m. Those slips show as follows:

Date	Clock-in Time
January 16, 2020	11:31 a.m.
January 17, 2020	11:33 a.m.
January 20, 2020	11:30 a.m.
January 21, 2020	11:33 a.m.
January 23, 2020	11:26 a.m.
January 28, 2020	11:33 a.m.

Employer also submitted a “Logbook” which shows journal entries purporting to document claimant’s attendance issues. The entries show a January 29 entry stating that claimant came into the restaurant and caused a scene, causing her to be terminated for her attendance. However, interestingly, this entry does not actually state that she was tardy on that date. There also is a January 7 entry indicating a warning in part for attendance issues. A January 6 entry reports a phone call from claimant indicating she may want a different job. Entries from December 31, December 20, December 16, and November 14 report additional tardies.

However, when comparing these logbook entries to the dates of tardiness that Burillo reported on the Fact-Finding Worksheet for Discharge, questions do arise. On that fact-finding document, Burillo claimed that claimant was tardy on January 14, 16, 17, 21, 23, 26, 27, and 28. It is therefore curious why none of those particular dates have entries on the logbook. It seems that if an employee has a repeated and continuous history of being tardy for work, that the employer would be assiduous about documenting those tardies. It does not seem likely that claimant had been tardy eight times over a 14 day period, that none of those instances would be noted on the logbook. This lends support to claimant’s claim that there was in fact a grace period for clocking in.

While the employer claimed that claimant was late to her scheduled work time on January 29, claimant testified credibly at the hearing that she has never worked on Wednesdays. According to claimant, the only reason she was at the restaurant on that day was to pick up her paycheck, because it had not been automatically deposited as it always had been before that date. She had earlier contacted Burillo about this and he told her that she needed to come into get her paycheck in person. When he told her to come get the paycheck, Burillo did not also tell her that she was scheduled to work that day.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the January 26, 2020 (reference 01) unemployment insurance decision that found claimant not eligible is reversed.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
> 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.

Iowa Admin. Code r. 871-24.32 provides in relevant part:

> Discharge for misconduct.
>
> (1) Definition.
>
> 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 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 definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) 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 employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd*., 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, *supra*; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

Thus, the first step in the analysis is to determine whether the absences were unexcused. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences due to properly reported illness are excused, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871- 24.32(7); *Cosper, supra*; *Gaborit v. Emp't Appeal Bd*., 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit, supra*. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc*., 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable.

Analyzing this case is made more difficult due to the employer's failure to participate in this hearing. As such, the undersigned relied solely on the administrative record, including the documents submitted during the fact-finding interview, and the testimony of claimant. The documents submitted below by the employer are not necessarily subject to simple interpretation. Some are ambiguous at best and the undersigned would have benefitted from a Mellow Mushroom representative explaining and laying a foundation for them. This also makes it more difficult for the employer to carry its burden of proof in this matter.

For reasons that will follow, I conclude Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the

meaning of Iowa Code section 96.5(2). First, the claimant seemed to be a credible person on the hearing. Her demeanor and recall of important events were such that I did not sense that she was lying or shading the truth. Second, as just noted, because the employer's documents were at times internally inconsistent, ambiguous, and lacking in an explanation from the persons who drafted the documents, I cannot fully credit them. As the party with the burden of proof, the employer's case must be well supported and convincing.

As an initial matter, and most significantly to my resolution of this case, the apparent inconsistencies in the Employee Warning Notice documents are damaging to and cast doubt on the employer's case. It does not look like the claimant's signature on any of them and they all only have her first name. It appears that the dates were written by the same person and thus not by the person who signed on the employee line. And, sometimes the handwriting of the employer seems to match the handwriting style of the person who signed for the claimant. Finally, claimant credibly denied ever having seen these documents, let alone signing them. All of this suggests or implies that perhaps they were after-the-fact fabrications. While I make no definitive finding that this was the case, enough questions surround the authenticity of these documents that there is doubt. And that doubt must carry over to the rest of the employer's case, including its documents.

This doubt is also evidenced in the lack of consistency in the logbook and the dates in the fact-finding document on which Burillo reported claimant was tardy. It is reasonable to assume that had claimant in fact been tardy that frequently over such a short period of time, that those instances would be noted in the logbook, but they were not. A few other earlier reported instances of tardiness were noted, so why were these not? Perhaps they did not occur or were not thought serious in that they were within the apparent grace period.

While it does appear that there was a work policy regarding tardiness, claimant credibly explained that as a longstanding and respected employee, she would have been considered to have been on time if she clocks in within 5 minutes of her actual start time. On the receipts that claimant submitted for the hearing, there were indeed some occasions where she was up to three minutes late. However, accepting at face value her explanation that this had always been acceptable I must accept it. This could also explain why those dates on which the receipts show she clocked in from 11:31 to 11:33 were not noted as conduct issues on the log books. That seems consistent with claimant's explanation about a five-minute grace period.

Furthermore, as that claimant explained, she was not generally scheduled to work on Wednesdays. Nor was she scheduled to work specifically on January 29, 2020. The only reason she went into the restaurant on that day was to pick up her missing paycheck that Burillo had told her she needed to come into the restaurant to get. This would again cast doubt on a claim that she was tardy for a scheduled work shift on that day. Finally, I cannot conclude that the claimant was given any warnings about instances of tardiness in light of the lack of authenticity I have ascribed to the Employee Warning Notice documents.

All of this leads to the conclusion that there were not excessive unexcused instances of tardiness such that they would be considered to be deliberate, intentional, or culpable acts against the interest of the employer. As such, the employer has not met its burden of proof to establish misconduct. The record does not support that the claimant was discharged for any disqualifying reason.

DECISION:

The January 26, 2020, 2019 (reference 01) unemployment insurance decision is REVERSED.

David Lindgren
Administrative Law Judge
Department of Inspections and Appeals
Administrative Hearings Division
Fax (515) 281-7148

April 15, 2020

Decision Dated and Mailed

DBL:lb