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

SHANA L WALSH	:	
	:	**HEARING NUMBER:** 17BUI-12845
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
CARISCH 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: 96.5-2-A, 96.3-7

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:

Shana Walsh (Claimant) worked for Carisch Inc. (Employer) as a part-time crew member from April 15, 2016 until she was fired on November 5, 2016.

The Employer has an attendance policy that requires regular and prompt attendance, and that provides that tardiness is unacceptable. When employees are going to be late or absent, they are to call the Employer at least three hours prior to their shift. The Employer also has a no-call/no-show policy that if an employee has two consecutive no-call/no-shows, then the Employer considers the employee to have voluntarily quit. The Claimant was aware of the Employer's policies.

The final incident occurred on November 3, 2016 when the Claimant was a no-call/no-show for her scheduled shift (11:00 a.m. to 4:00 p.m.). Claimant did not call the Employer prior to or during her shift. Claimant called the Employer at 4:45 p.m. and spoke to Ms. Koerner. Claimant told Ms. Koerner that she woke up for her shift, got dressed, then sat down on her bed, and fell asleep. Claimant told Ms. Koerner that she just woke up when she called. Ms. Koerner told Claimant that her shift was over for the day and they would speak on Claimant's next shift. The Claimant's next shift was November 5, 2016. On November 5, 2016, Ms. Koerner told Claimant that she was discharged.

The Claimant was repeatedly given verbal warnings over her tardiness. She was given such warnings on September 15, 2016 and October 6, 2016, but she received verbal cautions on many other occasions as well. On October 6 when the Claimant came to work she asked if she still had a job. Every time the Claimant was tardy the Employer would speak with her.

Claimant was tardy on: July 31, 2016; August 7, 24, 25, and 30, 2016; September 3, 15, 25, 29, and 30, 2016; October 3, 6, 8, 15, 17, 21, 22, 23, and 30, 2016, during her employment. The Claimant's tardies were due to her oversleeping.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2017) 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 requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

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).

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final issue which caused the discharge was 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 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"). The court has found unexcused issues of personal responsibility such as "**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) *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").

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 Employer's evidence that the Claimant was aware that her repeatedly being tardy could result in her termination, and that she had been given multiple oral warnings. The Claimant was aware that by being repeatedly tardy she was placing her job in jeopardy. At a minimum her inquiry on October 6 about whether she had a job establishes this.

All the tardies listed in the findings of fact are unexcused since oversleeping is not a reasonable ground for tardiness. The final absence is also unexcused as not being properly reported.

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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); *see 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).

By our count the Claimant had unexcused tardiness 20 times in just under seven months, and one unexcused absence over the same period. This is clearly excessive.

The Courts have found lesser absenteeism to be excessive. In *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984), Ms. Higgins had seven unexcused absences in five months. The Claimant had more attendance issues in a little more time, resulting in a much higher rate of tardiness. 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 - over eight months. *Infante* at 264, p. 267. This was "sufficient evidence of excessive unexcused absenteeism…to constitute misconduct." *Infante* at 267. The rate here is very much higher – many more tardies in less time. In *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007) the Court was faced with a claimant who had eight absences over a eight-month period. The claimant argued that of her eight absences most were excused under the law. The Court of Appeal found it unnecessary to address this argument, since three of the absences, over a period of eight months, were unexcused. "[W]e find the three absences constitute excessive unexcused absenteeism." *Armel* slip op. at 5. Here the rate is again much higher than in *Armel* and the total greatly exceeds the absences in *Armel.* The same is true of *Hiland v. EAB*, No. 12-2300 (Iowa App. 7/10/13) where excessive absenteeism was found for three unexcused absences over seven months. Here the Claimant's history, similar to that in *Higgins, Infante*, *Armel,* and *Hiland,* shows unexcused absences and tardiness. Since the rate of unexcused issues exceeds that in these cases we feel confident in concluding that the Claimant's unexcused tardies were excessive.

The Claimant is disqualified based on her discharge for excessive unexcused tardiness.

No repayment of overpayment: Since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
>
> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
>
> b. However, if the decision is subsequently reversed by higher authority:
>
> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but **the Claimant will not be required to repay benefits already received**.

DECISION:

The administrative law judge's decision dated December 20, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits based on this Employer's wage credits 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. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

_____
Kim D. Schmett

_____
Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv