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

KRISTA R MILLS	:	**HEARING NUMBER:** 22B-UI-03459
	:	
Claimant	:	
	:	**EMPLOYMENT APPEAL BOARD**
and	:	**DECISION**
	:	
PILOT TRAVEL CENTERS LLC	:	
	:	
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, 96.3-4

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:

Claimant was employed part time as a restaurant team member from December 2, 2019, until this employment ended on December 21, 2021, when she was discharged.

The employer has a policy that the commission of two serious offenses will result in automatic termination of employment. Under the policy, no call/no shows are considered serious offenses.

This policy appears in its employee handbook is reviewed by all employees at hire and is available online for employees at any time.

Claimant was scheduled to work December 20 and 21, 2021. She did not report for work or call in as absent on either day. On both days, General Manager Crystal Porter reached out to her to inquire about her well-being. Porter never received a response from claimant. Because claimant had not reported for work or called in as absent for two days, her employment was terminated on December 21, 2021. Claimant had received previous warnings about attendance.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2022) 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 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).

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final tardiness which caused the absence was unexcused. Again an absence can be unexcused because not for reasonable grounds or because not properly reported. Here the two days absence was neither. First, there is no reasons established for the absences. This is not reasonable grounds to miss work. Second, the Claimant did not report the absences at all.

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the absences were excessive. In cases of absenteeism it is the law, and not the Employer's policies, that decides whether absences are excused or not. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). It is the same with excessiveness of absences. It is the Board, not the employer, who decides if *misconduct* is shown.

Two absences is minimum there can be to have a repeated absence. Here the absences were exacerbated by being no call, now show and by being two in a row. In the case of *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. That claimant missed her last day to care for a sick child, but did not call in. She 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 were unexcused. The three absences were in October, March, and May. The Court ruled "we find the three absences constitute excessive unexcused absenteeism." *Armel* slip op. at 5. While the Claimant in this case has two absences, and *Armel* had three, there are aggravating circumstances in this case compared to *Armel*.

First of all, the Claimant was absent two days in a row. So he missed more unexcused days in a week than Ms. Armel missed over any two months. Second, Armel was no call/no show on only her last absence while the Petitioner was no call/no show on both. Third, Ms. Armel had an undeniable reason for missing work, a sick child. There are no reasons shown in this record for the Claimant's absences. Fourth, this Employer had a clear policy that two no call/now show is termination and the Claimant signed for this policy. Fifth, the Claimant was nonresponsive when called on *both* days. The Claimant in effect just disappeared. We find the Claimant was guilty of excessive unexcused absences and is thus disqualified for misconduct.

Single Absence Analysis: In the alternative we take up the question of when absences may be misconduct even when not excessive. In instances where an employee is fired for a *single* unexcused absence the issue is somewhat different than with excessive absenteeism. See *Hiland v. EAB*, No. 12-2300 (Iowa App. 7/10/13). With a single absence misconduct can be shown based on things such as the nature of an employee's work, the effect of the employee's absence, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of the absence. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). Here we have little on the nature of the work,

except of course that a member of a restaurant team who is a no-show will naturally cause delays in customer service. The Claimant made no attempts to report, and remained nonresponsive when called two days in a row. Claimant also should have known that two days no call/no show would result in termination based on the Employer's policies. Also, of course, this was two days of absence and not just one. So we have two no call/no show absences in a row over no reason shown in the record. We think that this is misconduct, even if not excessive unexcused absenteeism.

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

No Repayment Of Overpayment: Finally, 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.
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> 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.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (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 March 25, 2022 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits 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.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

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