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

LAUREL A BENSON	:	
	:	**HEARING NUMBER:** 18BUI-07930
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
PRIVATE VENTURE MANAGEMENT	:	
	:	
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, 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. Two 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.

This case was remanded for additional testimony. The Claimant did not attend the second hearing because she did not call in her number. Since the hearing was supplemental we considered the evidence admitted in *both* hearings including the Claimant's testimony in the first hearing.

FINDINGS OF FACT:

Laurel Benson (Claimant) worked for Private Venture Management (Employer) as a part-time caregiver from February 9, 2017 until she was fired on April 13, 2018.

The Employer's attendance policies provide that a single no call/no show shall result in an immediate write up and may itself result in termination.

Claimant had failed to call into work or show up at work on April 22, 2017. She was reminded about the Employer's attendance policy on that date. She was banned from working for 30 days.

The final absence occurred on April 4, 2018, when the Claimant did not call into work or show up at work. The Claimant called in on April 5 and explained that she didn't feel like riding the bus on April 4 and that is why she did not come to work.

On April 6 the Employer was contacted by the client's son who disclosed that jewelry at the home was missing, and that he was going to call the police. The police later that day contacted the Employer and got the Claimant's contact information so that she could be interviewed.

On April 13 the Claimant came in to retrieve her check. The Employer fired her at that time for the no call/no show. The Employer did not terminate earlier because it was having trouble getting the Claimant to come in for an in-person meeting and so it held her check. The Claimant was not terminated for theft, and we do not find that she committed any theft.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2018) 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).

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 call from the client about contacting the police was on April 6 (*after* the no call/no show) and that the police contacted the Employer for the Claimant's number later that day. Had the police already spoken to the Claimant on the 3rd they would not have called the Employer on the 6th to get the Claimant's contact information. Thus finding this evidence credible means we find the Claimant's testimony about a call from the police on the 3rd not to be credible. Moreover we find credible the Employer's evidence that on the 5th the Claimant called in and had explained her no call/no show with the excuse that she did not feel like coming into work on the 4th.

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 the Claimant is a caregiver rendering cares at a client's home. As a caregiver Claimant is expected to conform to certain standards of professional behavior that an employer may expect from a caregiver, particularly one that a client is expecting to come to the home. Naturally, a caregiver is expected to

give due notice when not showing up to an assignment. *C.f.* 655 IAC 4.6(3)g. (ground for discipline of a nurse include "[f]ailing to report to, or leaving, a nursing assignment without properly notifying appropriate supervisory personnel and ensuring the safety and welfare of the patient or client."). Looking to *Sallis* we think the factor of the nature of the work as a caregiver, the direct effect of an absence on the employer where care is to be in the home, and the failure of the Claimant to notify the Employer of the absence until after the fact all weigh against the Claimant. Also the Claimant had been previously disciplined for violation of the Employer's clear no call/no show policy. We disqualify the Claimant for the no call/no show under a *Sallis* theory, that is, for misconduct rather than excessive 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.

DECISION:

The administrative law judge's decision dated August 31, 2018 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".

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 none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

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

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Kim D. Schmett

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