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

ANDREW J SANKEY	:	
	:	
Claimant	:	**HEARING NUMBER:** 15B-UI-09741
	:	
and	:	
	:	**EMPLOYMENT APPEAL BOARD**
HORMEL FOODS CORPORATION	:	**DECISION**
	:	
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

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:

Andrew Sankey (Claimant) worked for Hormel Foods Corp (Employer) as a full-time boxer from July 19, 2011 until he was fired on April 22, 2015. He worked Monday through Friday from 6:48 am until 5:18 p.m. The Employer has a point policy where employees are given 11 attendance points, and then lose points for absences. A full absence is one point; a tardy is a half point. Half points are added back on periodically following good attendance.

A number of absences from the Claimant from April of 2013 through July 17 of 2015 were assessed points for absenteeism. Of these all were for properly reported illness except the following:

4/11/13.....absent for unspecified emergency
10/11/13.....tardy, no reason given
5/22/14.....tardy, no reason given
12/18/14.....absent for emergency for sick child
4/17/15.....No Call/No Show

The Claimant was no call/no show from April 20, 2015 through April 22, 2015. He showed up at the end of shift on April 22 and was then told he was fired.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2015) 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 absence which caused the absence 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"). Where the Employer shows that there was no excuse given at the time of the absence and none appears in the record of the hearing then that absence or tardy is not for an excused reason.

First the April 17, 2015 is not excused because it was not properly reported. The tardies in October of 2013 and May of 2014 are not excused because they are for "no reason given." *Higgins* at 191 ("no excuse").

Next we find the two emergency absences to be unexcused as not based on reasonable grounds since there was no reason given to the Employer (other than "emergency") at the time the Employer was considering discipline for the absence. Such a situation falls under the rule in *Spragg v. Becker-Underwood*, Inc. 672 N.W.wd 333, 2003 WL 22339237 (Iowa App. 2003). There the claimant had requested time off from the employer, was denied, and then fired when he missed work. The "ALJ subsequently found Spragg had committed misconduct by violating company rules on absenteeism." Spragg at *3. Mr. Spragg claimed that this time off should have been excused because he needed the time to tend to a sick child. The Court of Appeals did not merely accept this, despite the fact that Iowa Code §96.5(1)(c) allows for benefits when

quitting to tend a sick family member. The Court found instead that Mr. Spragg was disqualified for absenteeism, and that while he asserted a ground for it at the hearing he did not do so when requesting the time off. "[A]t the time of his request for leave he did not provide his employer with even that general assertion, but only that he needed time off for 'personal family emergency.' Therefore it was appropriate for the agency to consider only the information available to the employer at the time the request for leave was made." *Id.* Naturally, for a no fault employer who does not even ask for reasons, the claimant would be perfectly free at hearing to supply whatever explanation he had, being mindful, of course, that the agency is not bound to believe it, and that a "no reasons" is regarded as unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)(unexcused absence includes "no excuse"). But where the Employer at the time it is making the decision to discipline or terminate does seek the reason for the absence, the *Spragg* rule applies. In this way a claimant is thus encouraged to provide the relevant information in real time rather than inducing discipline from the employer by not giving the true reason, and only producing that reason in connection with an unemployment claim. The Claimant did not show up to hearing, and so the proof from the Employer that he only supplied "emergency" or even "sick child emergency" is sufficient for us to find the absences unexcused under *Spragg*.

In the alternative, even considering the Claimant's emergencies as described and accepting them at face value, we still find them not excused. Again the general rule is that "absenteeism arising from matters of purely personal responsibilities" are not excused. *Harlan v. IDJS*, 350 N.W.2d 192, 194 (Iowa 1984)(late bus). Thus car trouble, lack of childcare, late buses, and the like are not reasonable grounds for an absence. In *Harlan* a late bus was not excused absence. Similarly, the *Higgins* court found unexcused "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); *accord Armel v. EAB*, 2007 WL 3376929 (Iowa App. Nov. 15, 2007). In *Clark v. IDJS*, 317 N.W.2d 517 (Iowa App. 1982) the claimant was absent for eyeglasses repair, for a job interview, and for a "family problem." The Court affirmed a finding of misconduct for absenteeism. *Clark* at 518. In *Ray v. Iowa Dept. of Job Service*, 398 N.W.2d 191 (Iowa App. 1986) the final absence was unexcused because the agency concluded that the claimant was absent in order to move. *Ray* at 192. Furthermore this case is, again, within the *Spragg* case, this time its *alternative holding*. In *Spragg v. Becker-Underwood*, Inc. 672 N.W.wd 333, 2003 WL 22339237 (Iowa App. 2003) the employee was fired as a no call no show. He argued in front of the Court of Appeals that he should not have been disqualified since he missed work for his son who suffered from illness of a confidential nature. The Court denied benefits by ruling in the alternative. The first holding, which we have discussed already, was that since Mr. Spragg had not told his employer why he was absent, the reasons were properly disregarded. The alternative holding found:

> **Moreover, 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.** See Moulton v. Iowa Employment Sec. Comm'n, 239 Iowa 1161, 1172, 34 N.W.2d 211, 216 (1948) (The court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used.). We therefore agree there was substantial evidence for the agency to find Spragg had engaged in misconduct and affirm the denial of unemployment benefits.

Spragg v. Becker-Underwood, Inc. 2003 WL 22339237*3 (emphasis added). The Claimant in this case seeks to excuse his absences on the argument that he had compelling, albeit vague, personal reasons for missing work. The difficulty for him is that under *Harlan*, *Clark*, *Ray,* and *Spragg* reasons based on issues of personal responsibility, compelling or otherwise, are not good cause for missing work under the Employment Security Law.

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).

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. It is a question of applying the law, not the Employer's judgment of what is excessive.

By our count the Claimant had unexcused absences five times in 24 months, and more particularly three times in eleven months. This is excessive, although we acknowledge the issue is a close one. The Courts have found similar absenteeism to be excessive. 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 only somewhat less higher than in *Armel* and the total 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. In *Clark v. IDJS,* 317 N.W.2d 517 (Iowa App. 1982), the claimant was warned over absences, and then missed three more times. Even though the record did not show how many absences supported the warning, the Court affirmed disqualification based on that warning and the three subsequent absences. Here the Claimant had two unexcused absences following the warning of December, 2014. Here the Claimant's history, is sufficiently similar to precedent that we conclude that the Claimant's unexcused absences were excessive.

In the alternative if we disregard the absences for emergencies we cannot overlook that the Claimant was no call/no show for unexplained reasons from April 17 through April 22. We recognize that no points were assessed for the 20th, 21st and 22nd since the Claimant had reached zero, but on the other hand he was not actually fired until late in the afternoon of the 22nd. This being the case we can take into account the three unexcused absences on April 20 through April 22. They are unexcused because they are neither properly reported nor for reasonable grounds (no excuse). When added to the similarly unexcused no call/no show on April 17, we have four consecutive no call/no shows. These *alone* would be excessive unexcused absences. The Claimant is thus disqualified for these last four absences alone.

The Claimant is disqualified based on his discharge for excessive unexcused absences and tardies.

No Overpayment Repayment:

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.
>
> 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.

Note to Claimant: Although the Administrative Law Judge indicated that the Claimant participated in the hearing, he did not. 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 he has filed no argument with the Board. We recognize, of course, that until today the Claimant had been allowed benefits and thus did not choose to explain his 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, *including* in the count weekends and holidays. The Claimant may make whatever argument for reopening that he 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 September 17, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he 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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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv