

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

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**NICHOLAS B PEARSON**

Claimant,

and

**CENTRO INC**

Employer.

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**HEARING NUMBER: 14B-UI-08524**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**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**

**DECISION**

**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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following modifications:

The Claimant commutes to work from Cedar Rapids to North Liberty. On January 28<sup>th</sup>, the Claimant failed to report to work because his wife believed road conditions were bad due to inclement weather. Yet, there were no roads closed. (18:06-19:32) When he received his final warning on May 8<sup>th</sup> for being late, that warning included a caveat "...Continued compliance with the Attendance/Punctuality policy is critical to your employment and future infractions beyond the date...will be subject to *further disciplinary action, up to and including termination of employment.* (Emphasis added.) The Claimant signed in acknowledgement of receipt of this document that was entitled "Attendance Final Warning." Just a few weeks later, the Claimant was tardy, again.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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).

871 IAC 24.32(7) 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.

While the record shows that three of the earlier points assessed in 2013 were due to illness, and for our purposes, are considered excused, we find that the Claimant's last three attendance infractions were the result of personal issues. While a single absence on an emergency basis might be excused, the general rule is that "absenteeism arising out of matters of purely personal responsibilities such as child care and transportation have been held not excusable." *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984); accord *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007)(final absence due to lack of daycare for sick child); *Clark v. IDJS*, 317 N.W.2d 517 (Iowa App. 1982)("family problems" not excused). 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)(emphasis added); accord *Harlan v. IDJS*, 350 N.W.2d 192, 194 (Iowa 1984)("absenteeism arising from matters of purely personal responsibilities" are not excused and thus tardiness due to late bus was not excused).

The Claimant's excuse that he, essentially, missed potential ride with his boss on January 28<sup>th</sup> implies he had a transportation issue. His final absence was the result of oversleeping. The Employer has a right to expect its employees to be on time, and available for work when scheduled. The Employer has an attendance in place for a reason. The Claimant had knowledge he was on a final warning, thus, it was incumbent upon him to ensure that he arrived at work in a timely manner lest he suffer the consequences of that final warning. His failure to do so, particularly for a second time in one month is a disregard of the Employer's interests. Based on this record, we conclude that the Employer satisfied their burden of proof.

**DECISION:**

The administrative law judge's decision dated September 15, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying reasons. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Kim D. Schmett

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Samuel P. Langholz

**DISSENTING OPINION OF ASHLEY R. KOOPMANS:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the administrative law judge's decision in its entirety.

AMG/fnv

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Ashley R. Koopmans