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

BRADLEY E COX	:	
	:	**HEARING NUMBER:** 10B-UI-07051
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
CASEY'S MARKETING COMPANY	:	

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:

The claimant, Bradley E. Cox, was employed by Casey's Marketing Co. from May 26, 2009 through March 1, 2010 as a part-time cashier. (Tr. 2, 6) At the start of his employment, the claimant received the employer's attendance policy for which he signed an acknowledgement of receipt. (Tr. 4-5) Part of that policy sets forth that "…During the first year of employment, a combination of two or more occurrences per calendar year of unscheduled absences or of tardiness is considered excessive, one or more long-term occurrences may also be considered excessive.…" (Tr. 9) A violation of this policy "…will result in correction…up to and including dismissal…" (Tr. 9)

The claimant had a history of excessive absenteeism for which he received numerous warnings. (Tr. 3, 7, 9) Some of those absences were due to illness that the employer offered leniency with his work schedule. (Tr. 8, 9) Mr. Cox was tardy on February 19th, February 26th, March 3rd, and March 5th, 2010. (Tr. 5, 7, 8) On February 26, 2010, the claimant also called off work due to illness. (Tr. 3, 7)

The employer

issued a final written warning on June 8, 2009 directing him not to be tardy again. (Tr. 3, 10)

The employer scheduled Mr. Cox to work on March 8th and March 10, 2010. (Tr. 6, 8) The claimant was a no call/no show for both days. (Tr. 3-4, 5, 6, 11) When he returned to work, he offered no reason for these absences. (Tr. 4) The employer terminated Mr. Cox for violating the employer's policy against such absences. (Tr. 11)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) 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).

Iowa Code section 96.6(2) (2009) provides, in pertinent part:

> …If an administrative law judge affirms a decision of the representative, or the Appeal Board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5….

Although the record clearly reflects that Mr. Cox had absences attributable to illness and of which, according to unemployment compensation law would be excused, both parties agree that the claimant had numerous tardies. (Tr. 5, 7, 8) The claimant's tardies were all for personal reasons, i.e., flat tires, kids late for school, etc. (Tr. 5, 7) The Iowa Supreme Court has held that absences for purely personal reasons, i.e., transportation, are unexcused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); see also, Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984)

Based on his tardies, alone, the claimant should have been subject to termination based on the employer's policy. (Tr. 9) However, when considering the final absences (two days of no call/no show) for no articulated reason, the employer justifiably decided to sever their employment relationship. The claimant admitted not calling the employer on March 8th to report his absence (Tr. 6-7) as well as admitted he had no reason for failing to call in. (Tr. 7) Such a seemingly lackadaisical attitude towards fulfilling one's job responsibility can only be construed as a blatant disregard for the employer's interest in light of his past warnings.

871 IAC 24.32(8) 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.

Although Mr. Cox testified that he 'believes' he was sick on March 8th, his response was noncommittal; and in conjunction with his failure to call in the next scheduled workday (March 10th), he sealed his fate. The claimant knew, or should have known that his job was in jeopardy. His denial that he didn't know is simply not credible given the past warnings and his acknowledgement of having read and signed the policy (Tr. 4-5), which he did not refute. (Tr. 9) There is no doubt that his prior history of multiple tardies and prior warnings factored into the employer's decision to discharge him for these final absences. Based on this record, we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated July 1, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. 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".

Although this decision disqualifies the claimant from receiving benefits, those benefits already received shall ***not*** result in an overpayment. Nor will the employer's account be charged.

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/kk