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

JASON L PENDLETON	:	
Claimant	:	**HEARING NUMBER:** 17BUI-11211
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
KRAFT HEINZ FOODS 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 ALLOWED IF OTHERWISE ELIGIBLE

The Claimant 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Jason Pendleton (Claimant) worked for Kraft Heinz Co. (Employer) as a full-time production team member from July 25, 2016, until he was fired on October 9, 2017.

The Employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employer Exhibit 1. The policy also provides that an employee will be warned at twelve attendance points, and will be discharged upon receiving two more attendance points after such a warning.

Claimant was given a final warning for absenteeism on September 7, 2017 when he was at 12.5 points. He subsequently received attendance violations for September 16, 2017 (absent due to illness (1 point)) and September 25, 2017 (left early without working overtime (.5 points)). The final incident occurred when the

Claimant was tardy on October 2, 2017. Claimant Exhibit B. Claimant was 2.5 hours late to work on October 2, 2017. Claimant Exhibit B. The Employer gave Claimant one attendance point for this tardy, which gave him a total of fifteen attendance points. Claimant Exhibit B. The Employer then conducted an investigation to ensure Claimant's attendance points were accurate. On October 9, 2017, the Employer informed Claimant he was discharged for attendance. The Claimant had been placed on the schedule for October 2 with several different listed starting times. He came in when he in good faith thought he was in fact scheduled.

The evidence on the Employer's policy, and the math of the attendance points, establish that the Claimant would be discharged following his final warning if he accrued a total of 14.5 points (two more than at warning). This he did only once he was charged for October 2, and thus the Employer would not have discharged the Claimant had he not been charged for tardiness on October 2, 2017. That tardy was a "but for" and proximate cause of the termination.

The record shows the following attendance points:

Date	Point Assessed	Running Total
8/31/2016	0.5	0.5
10/21/2016	0.5	1
10/26/2016	1	2
11/2/2016	1	3
12/2/2016	1	4
12/8/2016	0.5	4.5
12/20/2016	0.5	5
1/31/2017	1	6
2/23/2017	1	7
3/17/2017	1	8
5/5/2017	0.5	8.5
5/19/2017	1	9.5
6/2/2017	1	10.5
6/3/2017	1	11.5
8/24/2017	1	12.5 (warn 9/7)
9/16/2017	1	13.5
9/25/2017	0.5	14
10/2/2017	1	15 (12.5 + 2 = 14.5)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) 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). The determination of whether an absence is unexcused because not based on reasonable grounds does not turn on requirements imposed by the employer. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007).

As noted, the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. In consonance with this, 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); *accord 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). At the same time, where the incidents leading to the final warning do not, even in aggregate, constitute misconduct "the impetus is not thereby provided to elevate the [subsequent] warning or the whole to the status of misconduct." *Infante v. IDJS*, 364 N.W.2d 262, 266 (Iowa App. 1984). In such a case the final act would have to independently constitute misconduct in order to disqualify a Claimant. Conversely, while prior incidents affect the weight of the final incident they do not dictate its character, that is, if the final incident does not involve intentional action or demonstrate negligence of equal culpability it cannot be the basis of a disqualification. Past acts of possible misconduct are taken into account when considering the "magnitude of a current act". They do not convert innocent mistakes into misconduct. Otherwise the discharge would not be for a current act of "misconduct".

<u>*Application of Standards:*</u>

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 that the Claimant was justifiably confused because the schedule was unclear and that he reasonably thought that he was

not scheduled until 2:30.

The greater weight of the evidence supports the conclusion that the Claimant honestly thought that he was not scheduled to work at 11:30 on his final day. This understanding was the result of the confusing nature of the schedule. The confusion of the Claimant does not stem from the Claimant failing to fulfill his obligations such as checking the schedule. The Claimant's mistake, if mistake it be, was an honest good faith error. The Claimant will not be disqualified if the Employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). Where the Employer proves only that the Claimant honestly believed he was not scheduled to work at 11:30 and the Employer honestly believed the Claimant was scheduled to work at that time then no act of misconduct is shown. The fact of the Claimant's prior poor attendance does not raise this honest error in communication – which as far as the evidence shows is as attributable to the Employer as to the Claimant - to the level of misconduct. Even assuming the history of the Claimant's absences/tardiness is unexcused, the final incident, without which no termination would have occurred, was not unexcused under the law and thus those final absence cannot support a disqualification. *See Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007); *Gimbel v. EAB*, 350 N.W.2d 192 (Iowa App. 1992); *Roberts v. Iowa Dept. of Job Services*, 356 N.W.2d 218 (Iowa 1984); *see generally Cosper v. IDJS*, 321 N.W.2d 6, 10 (Iowa 1982). The termination was not for a current act of misconduct and the Claimant should not be disqualified from benefits.

DECISION:

The administrative law judge's decision dated November 22, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

The Claimant 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 Claimant 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.

Kim D. Schmett

Ashley R. Koopmans

DISSENTING OPINION OF JAMES M STROHMAN:

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

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James M. Strohman

RRA/fnv