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

TONDA L ALLEN	:	
	:	**HEARING NUMBER:** 14B-UI-08302
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. 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:

Tonda Allen (Claimant) worked for Casey's Marketing (Employer) as a part-time light-duty order filler for the warehouse from April 13, 2012 until she was separated on July 18, 2014. Under the Employer's policies a worker is discharged when getting two no-call/no-show absences. Employees are required to report absences at least an hour before shift.

The Claimant was a no-call/no-show June 18 and June 20, 2014. On July 15, 2014 the Claimant reported a robbery. The responding police asked permission to look around her house and found a duffle bag left there which caused the police to arrest the Claimant for drug violations. The Claimant was arrested the evening of July 15, 2014, and was in jail until 8:00 p.m. July 16, 2014. She was scheduled to work at 6:00 a.m. July 16, 2014, but failed to call or show up for work until she called the employer at 12:15 p.m. As a result of her history of no-call/no show the Claimant was fired.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2014) 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). 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); c.f. 871 IAC 24.23(4).

Here the absences due to oversleeping are not based on reasonable grounds. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984). Further neither absence was called in on time, or anywhere near it, and so are unexcused because not properly reported.

The final absence, being in jail, is similarly not excused because neither for reasonable grounds nor properly reported. The Claimant's legal problems are clearly not excused. The general rules 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)(emphasis added). 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. The case at bar presents similar problems of personal responsibility. The Claimant went to jail, and was held there. We find that the Petitioner was in jail for issues of personal responsibility and thus her absences cannot be unexcused. This is so even though the jailing was something outside the Claimant's control. After all, the claimant in *Harlan* had a late bus for which she had no responsibility, the Claimant in *Higgins* had a late baby sitter entirely outside of that claimant's control, and so also with car trouble. Jailing is no more a reasonable ground for missing work than late buses or late babysitters or transportation issues or the "family problem" in *Clark*. By a similar analysis we do not excuse the Petitioner's failure to make *some* arrangement to notify the Employer before she did. The final absence was thus unexcused because it was neither for reasonable grounds nor properly reported.

The absences being unexcused – whether for lack of notice, lack of reasonable grounds, or both – the next issue is whether they were excessive. Although only three days they were no call/no show. In the case of *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007) the Court was faced with a claimant who had eight absences over an eight-month period. That claimant missed her last day to care for a sick child, but did not call in. She 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 were unexcused. The three absences were in October, March, and May. The Court ruled "we find the three absences constitute excessive unexcused absenteeism." Armel slip op. at 5. The Claimant in this case has three unexcused absences as well, but over a shorter period of time that in *Armel*. And while the Claimant had her reasons for not calling in, this was also true in *Armel* where the claimant was tending a sick child in a home with no phone. Like Ms. *Armel* the Claimant could have made arrangement to report that last absence phone or no.

Further, unlike Ms. Armel, all three of these no call/no shows were not for reasonable grounds even if we could excuse failure to report. Finally, even if we were to find only two no call/no show (one for oversleeping and the final one) still we would disqualify for excessive absenteeism, there being two no call/no show over just under a month.

DECISION:

The administrative law judge's decision dated September 3, 2014 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 Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Kim D. Schmett

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John M. Priester

DISSENTING OPINION OF ASHLEY KOOPMANS:

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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Ashley R. Koopmans

RRA/fnv