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

SCOTT F BROWNING	:	
	:	**HEARING NUMBER:** 17BUI-01276
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
FAREWAY STORES INC	:	
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: 96.5-1, 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. 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:

Scott Browning (Claimant) worked for Fareway Stores (Employer) in full-time pallet repair from May 8, 2013 until he was fired on December 6, 2016.

On November 14, 2016 the Claimant was arrested. The Claimant called the Employer that day and told his supervisor that he'd been arrested and wrongly accused of a violent crime. Claimant did not have information to share with the Employer about how long he might be in custody. The Claimant called the Employer again within a couple days and had a similar conversation. Claimant's sister called the Employer during that first week and left messages for the Employer about the incarceration. Claimant's attorney called the Employer around the 22nd. No one, who called the Employer, told the Employer of a definite time when the Claimant might be expected to be released from jail.

Claimant was terminated from his work on December 6, 2016. Given the Claimant's continuing absences, the Employer concluded that the Claimant's failure to call to work since late November constituted job abandonment. The Claimant was thus involuntarily separated from work by the Employer who called the separation a quit.

On December 30 the Claimant was released from jail because the charges against him had been dismissed. Immediately after getting out of jail the Claimant called his supervisor to tell him he was out. The supervisor told the Claimant to call human resources. The Claimant did so and was told he was terminated as of December 6.

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)(emphasis added); *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).

Irving v. Employment Appeal Bd., 883 NW 2d 179 (Iowa 2016) makes two things clear about jail cases. First of all merely being incarcerated is not a quit. We do not think a three day no call/no show rule changes this result. Thus we must analyze this as a termination case. Second, *Irving* makes clear that incarceration is reasonable ground for missing work in cases where the charges are dismissed. Since this Claimant was fired for attendance violations and since charges were dismissed, he had reasonable grounds for missing work. There remains, then, only whether the absences were properly reported.

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 the testimony from the Claimant about his calls to the Employer, and what he told the Employer during the calls.

We find that the Claimant sufficiently reported the absences. The Claimant told his Employer immediately of his arrest and incarceration. He indicated that he was wrongfully accused and would be detained. Within a couple days the Claimant again spoke to the Employer and explained he was in jail, and could not say when he was getting out for sure. This message was repeated when others called on the Claimant's behalf about a week after the incarceration. The Employer was thus on notice that the Claimant was incarcerated and could not say when he was to be released. He was meanwhile dealing with very serious legal issues. In general improperly or late reported absences will be deemed excused absences if the employee's failure to timely report the absence was due to incapacity or to the illness itself. *See Roberts v. Iowa Dept. of Job Services*, 356 N.W.2d 218 (Iowa 1984); *Floyd v. IDJS*, 338 N.W.2d 536 (Iowa App. 1983). Here the incarceration necessarily limits the Claimant's freedom to communicate with the Employer. Where the Claimant made clear the indefinite nature of the length of his incarceration, the incarceration itself explains and excuses any imperfections in the notification method. *See* Iowa Code §804.20 (setting out phone call right which, however, allows reasonable number of calls to *get an attorney* but otherwise mentions a single call). The bottom line is that the Employer did get notice which was reasonable under the circumstances and the final absences are thus excused under the law. *See Floyd v. Iowa Dept. of Job Service,* 338 N.W.2d 536, 538 (Iowa App., 1983) ("His employer knew that he was ill, and had fair warning that petitioner might be absent for an extended period of time due to that illness.").

Thus even though the Claimant's history of absences is excessive, the final period of absence was excused, and thus the final absences cannot justify a disqualification. This is because the final absences have not been proven to be other than properly reported and for reasonable grounds, and thus the Employer has not proven that the termination was for a current act of misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). In addition, where the precipitating cause of the discharge is an excused absence the discharge is not caused by misconduct and is therefore not disqualifying. See g*enerally, West v. Employment Appeal Board*, 489 N.W.2d 731, 734 (Iowa 1992)("must be a direct causal relation between the misconduct and the discharge"); *Larson v. Employment Appeal Bd*., 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); *Lee v. Employment Appeal Board,* 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). The final incidents, without which no termination would have occurred, were not unexcused under the law and thus those final absences 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).

DECISION:

The administrative law judge's decision dated April 3, 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.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv