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

GERALD A RIPPENKROEGER	:	
	:	**HEARING NUMBER:** 14B-UI-10488
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
WEST LIBERTY FOODS LLC	:	
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:

Gerald Rippenkroeger (Claimant) worked as a full-time boxer in packaged meats for West Liberty Foods (Employer) from August 5, 2013 until he was fired on July 21, 2014. The Employer assigns points for attendance. Late is half a point and personal absence a whole point. Eight points results in termination. The Claimant had the following attendance record:

Date	Event	Reason	Points/ Total
8/26/13	Late	None	.5 / .5
9/25/13	Late	None	.5 / 1
10/25/13	Late	None	.5 / 1.5
12/9/13	Late	None	.5 / 2
1/10/14	Late	None	.5 / 2.5
2/4/14	Absent	Personal (niece baby or no excuse)	1 / 3.5
2/5/14	Absent	Personal (niece baby or no excuse)	1 / 4.5

2/6/14	Late	None	.5 / 5
2/12/14	Absent	Personal (dentist appointment)	1 / 6
3/18/14	Late	None	.5 / 6.5
7/10/14	Late	None	.5 / 7
7/17/14	Absent	No call/Now Show (Adventureland)	3 / 10

On July 17, 2014 the Claimant was a no call, no show when he chose to go to Adventureland. He had not asked for a personal day that day, nor otherwise received permission to be gone that day. The Claimant had been on warnings over his attendance points, and was aware of the Employer's attendance policy. The Claimant had not presented physician notes for any of his absences, and the record shows that the absences in the record were not for illness of the Claimant except for February 12. The Employer investigated whether the Claimant had called in on the 17th and found no evidence of it. The Employer fired the Claimant for absenteeism.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: 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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. *Higgins v. IDJS*, 350 N.W.2d 187, 190 (Iowa 1984).

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final absence which caused the absence was unexcused.

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"). The court has found unexcused issues of personal responsibility such as "**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) *see Spragg v. Becker-Underwood, Inc.* 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003)(In case of disqualification for absenteeism the Court finds that "under Iowa Code section 96.5(2), 'Discharge for Misconduct,' there are no exceptions allowed for 'compelling personal reasons' and we cannot read an exception into the statute"). Where the Employer shows that there was no excuse given at the time of the absence and none appears in the record of the hearing then that absence or tardy is not for an excused reason.

Here there is no reason in the record for the 8 tardies, except a suggestion of transportation issues which are generally not excused. On the first two absences we know they were for personal reasons other than illness, which is what *Higgins* found to be unexcused. Certainly personal issues such as a niece giving birth are not excused under *Higgins*. The absence for the dentist we *do* excuse. This leaves only the final absence. Naturally, had the Petitioner had this day approved and been told no points would accrue we would find the absence to be excused. 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. We have found credible the Employer's evidence that the Claimant did *not* obtain approval for that final day's absence.

We note that we previously remanded this case, and in appealing to us the Claimant asserted "on July 17, 2014 I missed work cause my alarm never went off and I never called in cause it wouldn't did any good still a point against me. The last paper I signed had 7 points against me. Not sure how I got to 10." *Appeal of 9/16/24*. This is inconsistent with the evidence that he was approved to go to Adventureland. On balance we find the Employer's evidence that the Claimant did not get approval for that final absence to be more credible. We thus find the July 17 absence to be unexcused.

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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); *see 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). Specifically, "[h]abitual tardiness, particularly after warning that a termination of services may result if the practice continues, is grounds for one's disqualification." *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984)(quoting *Spence v. Unemployment Compensation Board of Review*, 48 Pa.Cmwlth. 204, 409 A.2d 500 (1979).

In cases of absenteeism it is the law, and not the Employer's policies, that decides whether absences are excused or not. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). It is the same with excessiveness of absences. It is the Board, not the employer, who decides if *misconduct* is shown. It is a question of applying the law, not the Employer's point system. Thus the courts do not simply take the legally unexcused absences and see if they exceed the Employer's point system.

For example, in *Armel v. EAB*, 2007 WL 3376929 (Iowa App. Nov. 15, 2007) the employer had a policy where a claimant would be terminated for seven points in a six month period. Ms. Armel missed two days in May and was fired. Over the rolling six month period she had only 5 points. Still she was disqualified. And she was disqualified, not upon a showing of 7 unexcused absences, but upon only three. The absences the Court found disqualifying were spread over, not 6 months but over 8 months (October through May). Or again in *Higgins v. IDJS,* 350 N.W.2d 187 (Iowa 1984) the Court listed out numerous absences, many of which were excused under the law. *Higgins* at 189, 191 [excused illness]. This brought her well under the absentee level that had resulted in her warning. Yet this did not mean that the Ms. Higgins got benefits. The Court simply reviewed the remaining absences, found them to be excessive and denied benefits. It did not even mention the level of tolerance the *employer* had for absences. Or again, in *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984) the employer had a policy that three written warnings in a nine month period resulted in discharge. It had no maximum "point" policy at all. Only that three warnings meant discharge. The third warning was for absenteeism, and discharge resulted. The Court of Appeals found that the first two warnings did not constitute misconduct, and had to be disregarded. *Infante* at 266. The Court then independently reviewed Ms. Infante's attendance record, and found disqualifying misconduct based on the "acts for which

petitioner was ultimately discharged…" *Infante* at 266. None of these decisions used the approach of hogtying misconduct to the Employer's point system.

If the Court in *Armel* had used a point method no disqualification would have resulted because 7 points were not shown. If the Court in *Higgins* had used the method at least a remand would be required to find out what the employer's attendance policy was. And if the Court in *Infante* had used this method no disqualification would have resulted because only one warning could be considered. The Courts do not simply apply the Employer's point system to the unexcused absences. They review the events causing the discharge, and ask if they constitute misconduct under the law. We now do the same.

By our count the Claimant had unexcused tardiness eight times in less than a year, and three unexcused absences over the same period. This is clearly excessive. The Courts have found similar absenteeism to be excessive. In *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984) the record showed five absences and three instances of tardiness – the last two being for three minutes and one minute late - over eight months. *Infante* at 264, p. 267. This was "sufficient evidence of excessive unexcused absenteeism…to constitute misconduct." *Infante* at 267. The rate here is nearly the same – about one a month. In *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007) the Court was faced with a claimant who had eight absences over a eight-month period. The claimant 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, over a period of eight months, were unexcused. "[W]e find the three absences constitute excessive unexcused absenteeism." *Armel* slip op. at 5. Here the rate is much higher than in *Armel.* Here the Petitioner's history, similar to that in *Infante* and *Armel,* shows repeated absences and tardiness, followed by warnings. Since the rate of unexcused absences is similar to those in these cases we feel confident in concluding that the Claimant's unexcused absences were excessive.

The Claimant is disqualified based on his discharge for excessive unexcused absences and tardies.

DECISION:

The administrative law judge's decision dated October 30, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he 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.

A portion of the Employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (records & policies) were reviewed, the

Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Kim D. Schmett

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Ashley R. Koopmans

RRA/fnv