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

KENTRELL B WILLIAMS	:	
	:	**HEARING NUMBER:** 20B-IWDUI-0158
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
PREMIER STAFFING 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: 96.5-2-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:

Kentrell B. Williams (Claimant) worked for temporary employer, Employer Premier Staffing (Employer) on assignment at Bertch Cabinets in Waterloo. He began working at Bertch Cabinets on August 19, 2019. The job was a full-time position. He worked from 36 to 40 hours a week. His work schedule was 6:30 a.m. to 4:30 p.m., Monday through Thursday. His supervisor at Bertch was James Northey. According to Premier Staffing Account Manager Erica Peterson, Claimant' placement at Bertch Cabinets was for 320 hours, and he could potentially be hired after that if Bertch was happy with his work performance.

On Monday, November 11, 2019, Account Manager Peterson received an email from James Northey about Claimant at 9:31 a.m. that states: "This gentleman has issues with attendance. Due to this reason I'd like to end his assignment after his shift today. We placed a lot of training into him. I cannot just allow him to show up late and other employees notice and wonder. I am sure you understand. Please contact him after 4:30 pm to tell him his assignment has ended. If you have any questions please contact me." Premier Manager Peterson responded a

few minutes later at 9:37 a.m.: "I was not aware he had attendance issues. Sherman or I will contact him after 4:30 pm today to let him know his assignment has been ended. Moving forward, could you please let us know each time someone is late/misses so we can try to coach them. We will start working on a replacement for Kentrell asap."

Bertch Supervisor Northey responded at 9:59 a.m. that Claimant was late to work on October 29, 2019 – arriving at 7 a.m. rather than his scheduled 6:30 a.m. On November 11, 2019, Claimant got to work at 6:45 a.m., fifteen minutes after his scheduled start time. Mr. Northey wrote that "normally if someone is late twice in a temp service I let them go. Normally this shows a pattern that continues when hired on, if hired on. Not everybody, but it happens. I have found it easy to replace, and get in somebody who shows their intent is to get her every day on time…"

Claimant did show up for work at Bertch the next morning, November 12, 2019, at his 6:30 a.m. start time. According to an 8:25 a.m. email that Bertch Supervisor sent Premier Manager Peterson that morning, Mr. Northey told him that Premier Staffing was trying to reach him and had left him voicemails. He told the Claimant to leave and to call Premier. Claimant left at 6:35 a.m.

Neither the Employer nor Bertch Cabinets had warned previously Claimant about his attendance. The record shows two tardies from the Claimant. One on October 29 of a half hour late, and one on fifteen minutes late on November 11.

The Employer has failed to establish by a preponderance of the credible evidence that the Claimant did not request reassignment within three days of the ending of this assignment. The Employer witness was unable to say whether the Claimant had contacted the Employer within 3 days from the end of the assignment.

When the coronavirus pandemic started, the Claimant stayed home to homeschool his children.

REASONING AND CONCLUSIONS OF LAW:

Misconduct: Iowa Code Section 96.5(2)(a) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 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).

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).

The Employer details two tardies in four months. We note that the email indicates that Northey had a tolerance of two tardies from a temporary service, and this corroborates that there were only two.

In this case, we have two instances of unexcused tardiness. Granted they are over a matter of weeks, and the employment here is short. But they are tardies, not absences, and the last if for about fifteen minutes. This militates slightly against their seriousness. The key is that we're faced with only twice, and, while the question is somewhat close, in our judgment under the circumstances of this case the two unexcused tardies do not rise to the level of *excessive* unexcused tardiness. This conclusion is further bolstered by the lack of any warnings. We also consider, although it is not necessary to our ultimate conclusion, that Northey indicated a lower tolerance of tardies from a temp worker, and that there is no evidence the Claimant was made aware of this. In any event, the Employer has not proven a discharge based on misconduct. It is not necessary for us to address whether our finding that assignment loss was not disqualifying would relieve the Claimant of the obligation to seek reassignment. This is because we find that the Employer also failed to prove the Claimant did not ask for reassignment within the applicable timeframe. We thus do not deny benefits based on the separation from the Employer.

Remand On Work Refusal

At hearing the evidence showed that following the assignment loss at Bertch, the Employer offered another assignment to the Claimant. The Claimant turned it down over starting pay. The evidence does not, however, show whether the offer was made in the benefit year, (after June 14, 2020) and nor does it show what the starting salary was. Since we allow benefits based on the nature of the separation, we must remand this matter to Iowa Workforce, Benefits Bureau to address whether the Claimant is disqualified for a refusal of suitable work.

Remand On Availability

The information available to the Board at this point indicates that, at least for some period of time following the Claimant's application for benefits, it is possible he is unavailable for work because of the necessity of providing his own childcare.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:
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> The individual is able to work, is available for work, and is earnestly and actively seeking work….

871 IAC 24.22 expounds on this:

> 871—24.22 Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> 24.22(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> …

> b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

Lack of daycare can make one unavailable for work. *see* 871 IAC 24.23(8).

The information indicates that the Claimant may not be available for some period during his benefit year because of a lack of childcare. We therefore remand to Iowa Workforce, Benefits Bureau to address this issue.

***Important note to Claimant**:* We have remanded this matter on the issue of possible lack of availability caused by a lack of daycare. If the Claimant is denied benefits as a result of this remand, all is not lost.

If the Claimant lacks daycare because of the Pandemic he may be able to get Pandemic Unemployment Assistance. This means that if he is denied regular benefits because of this lack of daycare then he should apply for Pandemic Unemployment Assistance [PUA]. PUA is designed for situations such as those where a person is unavailable because the Pandemic has closed schools and/or daycares. Should the Claimant wish to apply for PUA, the information on how to do so is found at:

> https://www.iowaworkforcedevelopment.gov/pua-information

The Employer should note that PUA is not charged to employers but to the federal government.

DECISION:

The administrative law judge's decision dated October 27, 2020 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

This matter is **REMANDED** to Iowa Workforce Development, Benefits Bureau to address the two issues of whether the Claimant refused suitable work during his benefit year, and whether the Claimant is able and available for work during his benefit year, as discussed above.

_____
Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv

_____
Myron R. Linn