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

JEANNA S OSBORNE	:	
	:	**HEARING NUMBER:** 20B-IWDUI-0001
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
SDH EDUCATION WEST 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, 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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.

The Board adopts the Administrative Law Judge's Findings of Fact and Reasoning and Conclusions of Law, but only in so far as they deal with the timeliness of the Claimant's appeal to the Administrative Law Judge. The Board thus affirms on this issue, and concurs that the Claimant's appeal was timely.

FINDINGS OF FACT:

Jeanna Osborne (Claimant) worked for SDH Education West LLC (Employer) as a full time as a barista from August 12, 2019 until she was fired on March 2, 2020.

Under the Employer's attendance policy, a worker is required to give no less than two hours notice prior to absence. The worker is also supposed to update the supervisor of the worker's condition if an absence exceeds one day. The policy also requires a written doctor's release
upon return to work in certain instances.

Claimant was absent on 2/12/20, 2/13/20, 2/17/20, 2/18/20, 2/20/20, and 2/21/20 because of illness, and she supplied a doctor's note. The Claimant received a written counseling on February 24, 2020. According to the counseling Claimant was absent 105.5 hours between 9/22/19 and 2/21/20. Of the absences before February 2020, the one on October 6, 2029 [five hours] was for a sick child, and the one on October 9, 2029 was for reasons the Employer has failed to prove, and the remainder were for illness. On 02/25/20 the Claimant was absent for illness which she properly reported. The Claimant was no call/no show on February 27 and was fired after this absence.

In all the Claimant was sick 13 days with no indication of improper reporting, absent one day for reasons not shown to be unreasonable grounds, absent 5 hours for a sick child, and no-call/no show on her final day.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards For Discharge Disqualification: 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:
>
> 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).

Unexcused: As an initial matter even though a party fails to appear at hearing it is still possible for that party to carry a burden of proof through evidence introduced by the opposing party. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer], and not by the claimant, does not diminish the probative value of it."). Nevertheless, it is somewhat troubling that the Administrative Law Judge admitted the Employer's exhibits without the Employer present, and simply told the Claimant the exhibits would be admitted without giving the opportunity for objections. Nevertheless, the Employer's Exhibits still do not prove its case and so any error by the Administrative Law Judge is harmless.

The Employer's policies do not dictate what is and is not an excused absence under the law. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa App. 2007)(question of whether an absence is excused under the Employment Security Law turns on the law and not on conditions imposed by employers); *Timmons v. EAB*, No. 16-0551 (Iowa App. 2-8-2017)(same). To be sure, the failure to present timely physician notes implicating leave may mean that the relevant absences are not protected by applicable laws (if any). But it does not make them "unexcused" for our purposes.

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 discharge was unexcused. Here only the Claimant supplies any testimony, and the Employer relied on exhibits. There is some lack of clarity on the reasons for the absence. Since the Employer has the burden of proof by statute this means, at minimum, that the Employer carries the risk of nonpersuasion.

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. Although we rely on the Employer's exhibits to detail the absences and their grounds there is conflict in the Employer's own exhibits. We have also gone with the version of absences listed by the Employer in the termination, where these conflict with earlier listings by the Employer. It seems to us that a later listing may be informed by additional information, and that an Employer has strong reason to assure that the reasons given for termination are accurate. This is why we have found that the February 12 & 13 absences were due to illness, not just a sick child. This means even assuming sick children are not reasonable grounds for a single parent to miss work, that the unexcused absences shown in the record are the absence on October 6, and the final absence which was not properly reported.

Excessiveness: Having identified the unexcused absences, i.e. the final one and October 6, 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). We find that two unexcused absences over 4 months is not excessive. The other absences were not shown by the Employer to be because of an *unexcused* absence. Benefits are thus allowed.

DECISION:

The administrative law judge's decision dated August 5, 2020 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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Ashley R. Koopmans

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James M. Strohman

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Myron R. Linn

RRA/fnv