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

SHAWNA VIRGIL	:	
	:	HEARING NUMBER: 09B-UI-08720
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
TYSON FRESH MEATS 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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Shawna Virgil, worked for Tyson Fresh Meats, Inc. from November 11, 2008 through April 25, 2009 as a full-time production worker. (Tr. 2) The claimant is a single parent with four children (Tr. 6) who lives in Fort Madison and commutes an hour and fifteen minutes to get to work. (Tr. 3) The employer has a no-fault attendance policy that allows employees up to 14 points (one point per day's absence) before being subject to termination. (Tr. 3) When an employee has a good excuse for their absence, no point is assessed; if an employee is having difficulty with the accumulation of too many points, the employer usually tries to work with them. (Tr. 3)

Ms. Virgil accumulated 3 or 4 points for absences due to her children's illness for which she provided doctors' notes. (4, 6) At that point, the employer issued a warning that she signed in acknowledgement of receipt, which indicated that she had six and a half points left. (Tr. 4) The claimant's son was involved in an accident for which Ms. Virgil took off one week, adding five more points. (Tr. 4, 6) The claimant kept in daily contact with the employer about her absences. The following week after her son's accident, the claimant's car broke down and she had no transportation to work. (Tr. 3-4, 5, 6) She continued to call in her absences, but could only leave messages that were unanswered. (Tr. 4-5)

By this time, Ms. Virgil believed she had accumulated 14 points and was unsure whether she still had a job. (Tr. 4) She did not want to drive all the way to Tyson because she had to go through a special security process to gain entry, if allowed. (Tr. 5) She eventually spoke with the head supervisor, Julian, on Friday who advised her "… before [she could come] in…he was going to be in contact with [her] to let [her] know if [she] needed to come in or if [she] needed to…talk to anybody…" (Tr. 5) Julian never called her back that day. (3, 5) On Saturday, Ms. Virgil went to Tyson, but was refused entry past the security gate. (Tr. 5, 7) The employer terminated her.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment

Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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).

The record establishes that the claimant accumulated points for absences primarily due to sick children and for a week to assist her son who had been involved in an accident. Ms. Virgil provided medical documentation to support that her absences were due to her children's illness. The court in Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. As for the week she took off to care for her son, the employer was unavailable to refute that these absences were also excusable.

The fact that Ms. Virgil accumulated many of her points due to the illness of her children is not counted against her for the purposes of unemployment insurance law. Thus, the employer's no-fault point system, in and of itself, is not dispositive the claimant's eligibility for benefits. While the employer may have compelling business reasons to terminate the claimant based on her many absences, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

As for the last absences that placed her arguably in excess of 14 points, generally, absences due to transportation difficulties would be considered unexcused (Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); see also, Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984); however, Ms. Virgil provided credible testimony that the employer had some discretion as to whether certain absences would be assessed points depending on the reason. Thus, she could not know that her job was in jeopardy without discussing options, if any, with her employer regarding these last absences. Her numerous attempts to contact the employer for further clarification were made in good faith. It was not unreasonable for her to wait to make contact with the employer prior to returning to work given the special process she had to go through in order to get past security. Considering the long distance she had to travel, it would have behooved her to wait for further instruction, lest she become stranded should she have gotten a ride out to the plant and been told she had to leave. Perhaps, the claimant used poor judgment in assessing her situation; however, there is nothing in this record to establish that her behavior was an intentional disregard of the employer's interests.

Since the employer failed to participate in the hearing to provide any evidence to refute the claimant's version of events, we attribute more weight to the claimant's testimony as to the reasons for her absences that the employer originally determined to be unexcused. Based on this record, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated July 7, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/ss

DISSENTING OPINION OF MONIQUE F. KUESTER:

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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Monique F. Kuester

AMG/ss