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

ANNA J DAVIS	:	
	:	**HEARING NUMBER:** 11B-UI-06288
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
CURWOOD 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: 96.5-2A, 24.32-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

STATEMENT OF THE CASE:

The issue of timeliness was raised when the Employer filed an appeal that was faxed on July 21, 2011, 24 days beyond the statutory deadline of June 27, 2011. The reason for the delay was because the Employer received the Notice of Decision on July 15th, at which time he reviewed the matter and subsequently file his appeal within a reasonable time after receiving it. For this reason, we find good cause has been established for the late appeal, and the board shall consider it to be timely.

The Employer 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:

The Claimant, Anna J. Davis, worked for Curwood, Inc., which is a division of Bemus Co., Inc. that acquired ALCAN (her original Employer) beginning March 1, 2010. The Employer has a point system attendance policy that provides an employee shall be terminated if they accrue 8 occurrences/points. (Tr. 2-3) Ms. Davis had an attendance problem for which she received a couple of written warnings. (Tr. 3)

On November 18, 2010, the Employer notified the union there would be a layoff of hourly employees, which included Ms. Davis. (Tr. 5) The layoff date was April 24, 2011. (Tr. 5, 6)

The Claimant was absent due to inclement weather on February 2, 2011. By this time, she had accumulated 5 points, which triggered another written warning that indicated "…any further occurrences within...a year will be cause for further discipline up to and including discharge." (Tr. 4) On February 20th, Ms. Davis was tardy, which resulted in half point assessment. (Tr. 4) She was absent from work on April 8th, which she later indicated was due to her car being impounded because of a flat tire. (Tr. 4-5) Since she did not call in or report this absence on the same date, she was assessed an additional three points. (Tr. 5)

On April 12th, the Employer learned that Ms. Davis was untruthful about the reason for her April 8th absence; her car was impounded because she had been pulled over for speeding while driving with a suspended license. (Tr. 5, 6) The Claimant had also accumulated 8.5 points, which subjected her to termination according to the Employer's attendance policy. (Tr. 4)

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).

Although the record establishes that the Claimant was already scheduled to be laid off on April 24th, we disagree that her discharge prior to the layoff is analogous to a prior voluntary quit under layoff circumstances as the administrative law judge reasoned citing 871 IAC 24.25(40).

Here, the Claimant had problems with attendance for which the record is void of evidence that any of her absences were due to illness, and excusable even under a point system attendance policy. In addition, she received several written warnings that further accrual of points could result in her termination. Her final absence on April 8th certainly landed her over the maximum allowable number of points (8.5). Ms. Davis was already on notice that her job was in jeopardy. The final absence was clearly due to her own self-inflicted loss of transportation and not excusable. Absences for purely personal reasons, i.e., transportation, are 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) Based on this record, the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated June 8, 2011 is **REVERSED**. The Claimant was discharged for disqualifying misconduct. Accordingly, the Claimant is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/fnv