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

FRANK FRESCAZ	:	
	:	HEARING NUMBER: 09B-UI-08800
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
OMFC SERVICE COMPANY	:	

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 Employment Appeal Board would adopt and incorporate the administrative law judge's Findings of Fact as its own.

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 knew he was at the end of his allowable points on April 28th. At that point, Mr. Frescaz had already accumulated 10.5 points and knew that half a point more would subject him to termination. (Tr. 7, 42) His request for additional PTO time and a puke bucket once he arrived at work were his good faith efforts to maintain his employment. (Tr. 8, 41) There is no dispute that the claimant was sick. His immediate supervisor (Brain Strong) admitted that Mr. Frescaz told him "… his stomach was upset… [he] needed more time…" prior to reporting to work. (Tr. 18, 21) The record corroborates that Mr. Strong witnessed the claimant carrying the bag containing his vomit about an hour after his arrival at work (Tr. 8-9, 16) as well as the employer overheard Mr. Frescaz throwing up, again, in the bathroom stall in the men's locker room. (Tr. 10, 22)

Although the claimant repeatedly refused to leave the premises as directed out of concern for acquiring an additional point that would end his employment (Tr. 8-10, 12, 19, 21, 51, 53), the employer offered no reassurance or clarification that this final point would *not* cost him his job. (Tr. 43) Rather, Mr. Strong merely reiterated that "this one instant… was not what put him in trouble in the point system…" (Tr. 10) The clarification Frescaz desired was the employer's reassurance that he would not lose his employment. The only clarification he got was that "… being sick, leaving work or not being at work is a point…" (Tr. 16), which understandably compounded the distress he was already feeling, which he externalized, admittedly, with argumentative remarks towards Strong. (Tr. 41, 44, 47) It is clear the claimant felt "horrible" (Tr. 44) and that his physical condition obviously affected his judgment.

We would note, however, that the policy and purpose behind unemployment insurance benefits is to ease the "… economic insecurity due to unemployment [which is considered] a serious menace to the health, morals, and welfare of the people of this state… [the legislature has therefore required] the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." See, Iowa Code section 96.2 (2009)

Here, the claimant was fighting the possibility of being discharged by imploring the employer to allow him to continue working and avoid incurring any more attendance points. It was not his fault that he was legitimately ill on April 28th, a scheduled workday. Albeit his past absences may have paved the way for his current predicament, 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. Given the employer's 'no fault' attendance policy, he knew his job was in jeopardy. (Tr. 8, 26-27) Frescaz was essentially forced to report to work lest he lose his employment. There is no doubt he was caught between the proverbial 'rock and a hard place.' While we certainly don't condone his behavior, we recognize that there were mitigating factors behind Frescaz' misguided attempts to retain his employment.

Granted, the claimant admitted that his behavior might be construed as insubordination, however, under the circumstances we find that his behavior was triggered by his illness coupled with Strong's uncompromising attitude against the claimant's situation. We would also note that the employer's 'no fault' point system is not dispositive of the claimant's eligibility for benefits under unemployment compensation law. Based on this record, we conclude that as to the insubordination issue, Mr. Frescaz' action was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct under the circumstances.

DECISION:

The administrative law judge's decision dated July 21, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

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/fnv