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

DARLYN FRUCTUOSO	:	
	:	HEARING NUMBER: 09B-UI-08476
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
IOWA PACIFIC PROCESSORS 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 IT 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, Darlyn Fructuoso, worked for Iowa Pacific Processors, Inc. beginning December of 1999. (Tr. 3-4) The claimant is a person whose first language is Spanish, and has limited proficiency in English. During the course of her employment, Ms. Fructuoso received three promotions: 1) meat cutter; 2) quality control; and 3) line supervisor. (Tr. 12)

On April 8th or 9th, the employer sent the claimant home and told her to return that Friday. (Tr. 8-9, 25) She worked that Friday doing different work than she was accustomed, i.e., washing the meat cooler. (Tr. 9) She was told not to report to work the following Monday (April 13th). (Tr. 23, 25, 32-33) She returned to work on Tuesday (April 14th) performing her normal duties on the line. (Tr. 9) Her supervisor asked her why she was there because she was not on the list for work that day. (Tr. 10, 25)

Confused, the claimant asked what was going on since she was, again, told to go home and her hours seemed to have been reduced. (Tr. 31, 33) The supervisor told her there was no work available. (Tr. 11)

Ms. Fructuoso returned to the workplace on Wednesday, April 15, 2009. (Tr. 4-5, 33) The employer held a meeting in which he explained to the employees that the company intended to start new projects. (Tr. 5, 11) The employer selected only a few workers to work these projects and instructed the others to leave after providing their contact information so that the employer could call them after construction work that was to last 2-3 weeks. (Tr. 6, 18, 21, 29) Ms. Fructuoso was one of the employees told to complete contact papers and to go home. (Tr. 6, 18-19, Exhibit 1)

After a few weeks of waiting to be called, the claimant contacted the employer. (Tr. 7, 22) Her supervisor told her she missed three consecutive days of work. (Tr. 7) She was surprised to learn that she no longer had a job.

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 claimant is a long-term employee (10 years) with no prior disciplines against her. The plant was under construction and the claimant's work schedule became very sporadic. The record establishes that Ms. Fructuoso reported to work on a couple of occasions only to be told to go home because there was no work for her, i.e., her name was not on the list for work that day. (Tr. 10)

On April 13th and 14th, the employer, again, sent Ms. Fructuoso home because there was no work available. The fact that the claimant reported to work the following day in spite of not being scheduled is probative that the claimant had no intention of quitting her job, but was attempting to retain it. (Tr. 4-5, 33) She complied with the employer's directive to attend the meeting in which the employer explained the interruption in production due to construction. She believed she was not selected to stay on for work when she was handed paper for completion of contact information for future work. Any reasonable person would have believed that she should not report to work unless she was called, particularly given her more recent experiences of showing up for work and being turned away.

The claimant clearly demonstrated that she wanted continued work when she contacted the employer after not hearing from them. The employer's not allowing her to return due to having been absent three consecutive days was tantamount to a discharge.

871 IAC 24.1(113)"c" provides:

> *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

The claimant provided credible testimony that she was absent prior to April 15th only because she was directed to go home due to lack of work. As for any alleged absences thereafter, she provided a reasonable explanation as to why she did not report to work based on the instructions she understood at the April 15th meeting. Although the employer begs to differ regarding what directive the claimant was told, it is plausible that the claimant may have misunderstood based on the limited language barrier what the employer stated at the meeting. If the claimant did misunderstand the employer's directives, it certainly wasn't intentional. Based on this record, we conclude that the employer failed to satisfy their burden of proving their case.

DECISION:

The administrative law judge's decision dated July 9, 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