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

STACEY A ETTER	:	
	:	HEARING NUMBER: 09B-UI-14618
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
G & K SERVICES 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 claimant, Stacey A. Etter, was employed by G & I Services Co. from May 12, 2008 through August 18, 2009 as a full-time general laborer. (Tr. 4, 7) The employer has a 'no-fault' attendance policy (point system) that the claimant received at the start of her employment. (Tr. 2-3, 4-5, 6, Employer's Exhibit 1-pp. 8-11) The claimant had problems with her attendance for which the employer issued several warnings (May 27, 2009, June 23rd & 24th, July 1st & 2nd, 2009) (Tr. 6, 8, Employer's Exhibit 1-pp. 6-7) Ms. Etter received a final written warning on July 24th for having a three-day absence due to illness even though she had a doctor's excuse. (Tr. 5, 8, 9, 10, Claimant's Exhibit A-p.

2)

On August 17th, the claimant was absent. (Tr. 4-5) She initially called in to see how many hours she had left for ETO because her fiancé was having emergency surgery that day. (Tr. 7-8) She had only 6.6 ETO hours, which did not cover the 8-hour shift she missed. (Tr. 10-11, 12) Her immediate supervisor, Steven Harding, along with the production supervisor, Robert Persay, terminated her the following day for exceeding the number of allowable points in a 12-month period. (Tr. 4, 7)

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).

871 IAC 24.32(7) 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.

The claimant was discharged for exceeding the employer's attendance points threshold. We note, however, that a 'point system' attendance policy is not dispositive of misconduct for the purposes of unemployment insurance law. It is clear from this record that the employer counted absences due to illness in assessing points. 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. See also, Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the employer was fully within its rights to assess points or impose discipline up to or including discharged for the absence under its attendance policy.

Based on the claimant's unrefuted testimony, the absences that led to the July 24th final warning should have been considered excused. As for the final absence, she properly reported that her fiancé was having emergency surgery. For this reason, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated October 29, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

_____
John A. Peno

_____
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.

_____
Monique F. Kuester

AMG/ss