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

CHERYLYNN M BARNHILL	:	
	:	**HEARING NUMBER:** 11B-UI-12982
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
CARLOS OKELLEYS 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. Two 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, Cherylynn M. Barnhill, worked for Carlos O'Kelley's, Inc. from April 28, 2011 through September 6, 2011 as a full-time server. (Tr. 2, 8) The Employer has an attendance policy that requires employees to contact the Employer at least two hours prior to the start of that employee's shift if the employee is going to absent. (Tr. 2) The Claimant had a problem with attendance.

Ms. Barnhill was absent July 23, 2011, as it was the anniversary of her son's death, which she previously requested time off. (Tr. 4, 7) The Claimant called off work at 10:01 a.m. on July 25th, and on August 4, 20ll for reasons unknown for which the Employer issued a written warning regarding her attendance. (Tr. 3, Employer's Exhibit 1-unnumbered p. 8) On August 18th, the Employer deemed her a no call/no show when she mistakenly reported to work on the wrong shift. (Tr. 6) The Employer issued another written warning on August 18th. (Employer's Exhibit 1-unnumbered p. 7)

On September 4th, the Claimant was scheduled to work at 11:30 a.m. She contacted the Employer within a half hour of the start of her shift (Tr. 2, 4, 6) to inform the Employer that she had injured her neck and would not be reporting to work. She did not call at the requisite 9:00 a.m. because she thought she could remedy the problem herself. When she realized she couldn't, as she was unable to move her neck, she called in her absence. (Tr. 6) Ms. Barnhill then waited for a friend to take her to the hospital to seek medical treatment. (Tr. 6, 8, Claimant's Exhibit A-unnumbered pp. 4-5)

The Employer initiated a 'Termination Report' on September 4, 2011 that the Claimant signed in acknowledgement of receipt at meeting with the Employer on September 6, 2011. (Tr. 8, Employer's Exhibit 1-unnumbered p. 5)

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 was a short-term employee having missed numerous days of work. Her final absence of September 4th was due to illness, i.e., stiff neck, which she reasonably assumed would negatively impact her ability to perform her job. Although she attempted to alleviate her symptoms on her own, she was unsuccessful, which caused her delay in calling the Employer. (Tr. 6) While it may not have been the best judgment on her part in light of her final warning, we conclude that the nature of her absence (illness) was excusable by law. 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. Ms. Barnhill's absence fits squarely within the purview of Iowa law. For this reason, we conclude that the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated October 26, 2011 is **REVERSED**. The Employment Appeal Board concludes that the Claimant discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Monique F. Kuester

AMG/fnv