

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

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PATRICIA VILLALOBOS

Claimant,

and

SWIFT & COMPANY

Employer.

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HEARING NUMBER: 08B-UI-08807

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**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: 96.5-1**

**DECISION**

**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, Patricia Villalobos, worked for Swift & Company from December 17, 2007 through July 3, 2008 as a full-time production worker. (Tr. 2, 8) The employer has an attendance policy that specifies if an employee does not report to work, nor call in to report an absence, for three consecutive days, that employee is considered to have quit his employment with Swift. (Tr. 5) Ms. Villalobos signed off in acknowledgment of receipt of this policy at the start of her employment.

On July 3<sup>rd</sup>, at approximately 10:30 p.m., the claimant spoke with her supervisor, requesting permission to take one week off work due to a personal emergency involving her husband and kids." (Tr. 10, 13) Ms. Villalobos' husband was drunk and driving around with their children (Tr. 15) who escaped from

the

car to seek their mother's assistance at the workplace that very night. (Tr. 14-15) Her supervisor told her he would contact the office and not to worry, but that she needed to call in every day. (Tr. 16) She did not complete an absence request form to cover these absences. (Tr. 19) Ms. Villalobos needed to drive her five children (ages 10, 9, 7 and 4) to Indiana to be with her sister. (Tr. 14-15) She was not scheduled to work July 4<sup>th</sup> through the 6<sup>th</sup> due to the holiday and weekend; however, she was absent Monday (the 7<sup>th</sup>) through Friday (the 11<sup>th</sup>) with her supervisor's permission. (Tr. 6, 10-11) She called in every day she was absent, leaving a message on the attendance answering machine. (Tr. 12-13, 18)

When Ms. Villalobos returned to work on Monday, July 14<sup>th</sup> (Tr. 20), her timecard was rejected; she questioned the employer who informed her that she no longer had a job (Tr. 9) because she was a no call/no show for three consecutive days. (Tr. 4-5, 18, Exhibit 1) The employer also requested that she return her work items.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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 Ms. Villalobos was off work from July 7<sup>th</sup> through the 11<sup>th</sup> to care for her children in an emergency situation. The claimant provided credible testimony that her supervisor was aware of her circumstances and granted her a week off to care for her young children. (Tr. 13) Ms. Villalobos followed the supervisor's reasonable instructions to call in each day (Tr. 12, 16), which the employer argues was not a daily occurrence. We note that the employer does not dispute that the emergency situation existed; rather, the employer argues that the claimant's supervisor had no authority to grant her a week off, only three days without the Human Resources' approval. (Tr. 19) The employer failed to provide the claimant's supervisor as a witness at the hearing to refute the claimant's firsthand testimony. Thus, we attribute more weight to the claimant's version of events.

Ms. Villalobos' return to work as scheduled on July 14<sup>th</sup> is probative that she had no intention to quit her employment. She reasonably believed her week off was authorized and she merely sought to return to work. The fact that her timecard was rejected establishes that it was the employer who initiated her separation, which can only be characterized as a discharge for which misconduct must be established. See, 871 IAC 24.1(113)

Since we characterize her separation as a discharge, the burden is on the employer to establish her disqualification. The employer offered no evidence to support that the claimant had a history of absenteeism, insubordination, etc. While her leaving may have been inconvenient for the employer, it appears that her supervisor was well aware of the situation and the claimant acted in good faith in taking leave in accordance with her supervisor's instructions. At worst, she may have used poor judgment in failing to complete an absence request form. But given the circumstances, such an oversight did not rise to the legal definition of misconduct.

#### **DECISION:**

The administrative law judge's decision dated October 30, 2008 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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**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