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

ALBA ROSALES PEREZ	:	
	:	**HEARING NUMBER:** 11B-UI-06280
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
WEST LIBERTY FOODS LLC	:	
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, 24.32-7

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, Alba Rosales Perez, worked for West Liberty Foods, LLC from October 15, 2009 through April 7, 2011, as a full-time production worker. (Tr. 6-7, 18-19) The employer has a point system attendance policy, which provides for warning at the accumulation of 10 occurrences. However, an employee will not be terminated, unless that employee has had an L-3 notification issue. (Tr. 8) An L-3 notification is a "…final warning…letting [the employee] know that you have reached the maximum occurrence level." (Tr. 13) If a person is absent for seven consecutive days and submits a doctor's excuse, the absence is counted only as one occurrence. (Tr. 17)

The claimant had an ongoing problem with attendance for which she received numerous warnings. Most of her absences were due to illness that she reported at the appropriate time. Ms. Alba was on a medical leave of absence (FMLA) for a nonwork-related issue for approximately 12-14 weeks, until she her doctor released her to return to work without restrictions on March 14th, 2011. (Tr. 14, 16, 20)

She called off sick for personal reasons on March 15th, and worked a partial workday on the 17th. (Tr. 14) By this time, the claimant had an additional accumulated 9 points. (Tr. 9, 11) Ms. Alba called off sick each day from March 30th through April 1st. (Tr. 12) The claimant sought medical attention from three different doctors, but no one could diagnose her medical problem. (Tr. 21) Ms. Alba was hospitalized and unable to contact the employer on April 4th and April 5th for which the employer assessed 6 points more for being a no call/no show. (Tr. 11, 20, 21)

On April 6th, the claimant called in sick for that day, which resulted in another assessed point. (Tr. 8, 10, 11, 15, 19-20) Nikki Bruno, human resources generalist, issued a verbal L-3 notification as the claimant had accumulated a total of 21.5 occurrences. (Tr. 8-9) Ms. Bruno also warned her that if she failed to report to work the following day, she would be terminated. (Tr. 8, 10, 15, 19-20, 22-23) Ms. Alba told the employer that she had a doctor's note to cover her absences, and would release her to return Monday. (Tr. 23) When the claimant did not report to work the following day, she was terminated.

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 had excessive absenteeism primarily due to illness for which she informed the employer of her absences as well as usually submitted doctors' excuses for further verification. Although many of her absences involved consecutive days, her point accumulation was minimized pursuant to the employer's '7-day consecutive rule.' (Tr. 17) Even if the employer does not dispute that her absences were because of illness and reported, the court in Cosper, supra, 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. Alba's accumulation of excessive occurrences, coupled with her two days of being a no call/no show, (April 4th & 5th) led to the L-3 notification that put her on notice that her job was in jeopardy. We note, however, that her failure to call in those days was not intentional. Rather, her failure can be reasonably attributed to her obviously debilitating illness, which required hospitalization. (Tr. 11, 20, 21) This fact is undisputed by the employer who, basically, argues that her accumulation of points and failure to report on the 7th subjected her to termination. Exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct. It is irrelevant that Ms. Alba acquired 21.5 occurrences. She had a doctor's excuse to cover her April absences and released her to work on Monday, the 11th (Tr. 23); but for her termination, she would have presented it to the employer. It is clear from this record that based on her conversation with the employer on the 6th, she would be terminated the next day if she was absent for any reason. Since she had not yet been released on the 7th, we can reasonably assume she continued to be under her doctor's care, which would have also been excusable had she not been terminated. Based on this record, we conclude that the employer failed to satisfy their burden of proving misconduct based on excessive unexcused absences.

DECISION:

The administrative law judge's decision dated June 9, 2011 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

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

AMGkk