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

RICHARD W LUSHER Claimant, and TYSON FRESH MEATS INC Employer.	:	HEARING NUMBER: 09B-UI-13538 EMPLOYMENT APPEAL BOARD DECISION

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: 871 IAC 26.8(5)

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, Richard W. Lusher, was employed by Tyson Fresh Meats, Inc. from September 2, 2008 through June 4, 2009 as a full-time production worker. The claimant approached the Human Resources manager (no longer with the employer) to inform him of his need to go to alcohol treatment, which would last for two weeks. Mr. Lusher also told his immediate supervisor who together with the HR manager told him they would work with him regarding his job.

On May 18th, the claimant called in late, but didn't report to work. Mr. Lusher called in, again, on May 19th and 20th indicating that he was in treatment. He did not call in from May 22nd through June 4th, 2009 because he believed he was on a leave of absence agreed to by the employer. Based on the

employer's attendance policy, an employee who is a no call/no show for 5 consecutive days is considered to have forfeited their employment.

REASONING AND CONCLUSIONS OF LAW:

The record clearly establishes that the claimant intended to seek treatment for alcoholism. Although the employer argues that the claimant failed to complete paperwork, the employer does not deny that the claimant was, in fact, participating in a treatment program, which is corroborated by the employer's testimony that the claimant called in both May 19th and 20th about his being in treatment. Mr. Lusher reasonably believed he had authorization to be off work for two weeks for treatment based on the Human Resources manager and a supervisor's assurances that they would work with him regarding his continued employment. The employer failed to provide either the Human Resources manager or any supervisor to whom Mr. Lusher made prior arrangements to refute his assertions.

We cannot conclude that the claimant's no call/no show for more than 5 days was a quit, even if the employer has a policy that says so. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). The fact that the claimant called in for two days with information that the employer knew, or at the very least should have known, is probative that he intended to maintain his employment. Because the program lasted two weeks, it was not unreasonable for Lusher not to continue calling in. The employer's decision to sever his employment relationship based on their policy was tantamount to a discharge for which misconduct must be established. The burden is on the employer to establish that the claimant committed job-related misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

In addition, 871 IAC 24.32(4) provides:

> *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

There was no evidence adduced to support the claimant exhibited "… conduct evincing such willful or wanton disregard of an employer's interest… 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…" See, Iowa Code Section 96.5(2)(a) (2009). For this reason, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated October 9, 2009 is **REVERSED**. The claimant did not voluntarily quit his employment; rather, he was discharged and misconduct was not established. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

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