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

MARK EASTON Claimant, and CARGILL MEAT SOLUTIONS CORP Employer.	:	HEARING NUMBER: 09B-UI-13702 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: 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, Mark Easton, was employed by Cargill meat Solutions Corp. from March 19, 2008 through August 22, 2009 as a full-time production worker. (Tr. 2, 5) The employer has an attendance policy that operates on a point system. (Tr. 2) Mr. Easton reached his maximum amount of points allotted and was placed on a last chance agreement, instead of being terminated according to policy. (Tr. 2) His signed this agreement on April 16, 2009 agreeing not to accumulate any additional points until October 16, 2009. (Tr. 2, 5-6)

In August, Mr. Easton suffered a nonwork-related injury (torn shoulder muscle) (Tr. 8) that took him off work until August 10th. (Tr. 6) The employer called him into the office on August 20th to assign

him to one-hand duty until the company doctor could examine his injury. (Tr. 6, 8) That Saturday while the

claimant was at work, he saw several employees go under the tape to get a drink of water from the fountain. (Tr. 6-7) This was common practice even though the employer did not allow employees to cross over to the fountain when the tape was up. (Tr. 7, 10) When Mr. Easton bent over and attempted to do the same, Shawn Bagley (a supervisor) yelled at him to stay behind the tape. (Tr. 3, 6-7) The claimant complied and did not cross under the tape. (Tr. 7, 8, 9) Later that day, the employer called him into the office and terminated him for "crossing the tag... to get a drink... in an area that was not released." (Tr. 3)

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 Mr. Easton was on a last chance agreement for maximizing his attendance points, however, the employer failed to establish the nature of absences that got him to this point, and whether or not these absences would be considered excused under unemployment insurance law. The final act that led to Mr. Easton's termination involved an alleged act for which the claimant vehemently denied going under the tape to get a drink. Not only does the claimant provide credible testimony that he stopped short of following with through his original intention, he testified that employees routinely cross the tape to drink from the water fountain. The claimant's witness corroborated his testimony that people routinely did this (Tr. 10), and apparently without repercussions considering the claimant's attempt to do the same. Thus, the employer appears to have acquiesced to the employees' behavior in going under the tape to get drinks. (Tr. 7)

Although the employer's testimony contradicts the claimant's denial by arguing that two people witnessed this alleged act, the employer failed to provide either supervisor as a firsthand witness to refute the claimant's testimony. Thus, we attribute more weight to Mr. Easton's version of events. Based on this record, we conclude the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated October 20, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided she is otherwise eligible.

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John A. Peno

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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.

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Monique F. Kuester

AMG/ss