

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

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**CHAD A WARDLOW**

Claimant,

and

**GREAT SOUTHERN BANK**

Employer.

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**HEARING NUMBER: 10B-UI-19091**

**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: 96.5-2-a**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The employer 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

Chad Wardlow (Claimant ) worked for Great Southern Bank (Employer) as a personal banker from September 4, 2009, to November 11, 2009. (Tran at p. 2; p. 20-21). The Claimant was informed and understood that under the Employer's work rules, employees were subject to immediate termination for, among other things, the possession of firearms or other weapons on company premises. (Tran at p. 5-6; p. 15; p. 23; Ex. 4; Ex. 7). The Employer has a no tolerance policy relating to firearms. (Tran at p. 4; p. 12).

The Claimant was scheduled for training in Sioux City on November 11, 2009. (Tran at p. 8). He traveled from Des Moines to Sioux City with other employees in a company car on November 10. (Tran at p. 8). The Claimant had a handgun in his suitcase in the car. (Tran at p. 8).

The Claimant was sharing a hotel room with a fellow employee overnight on November 10. (Tran at p. 9). The Employer paid for the hotel room for employees attending the training. (Tran at p. 8-9). At some point, the employee saw the Claimant take the gun from the suitcase. (Tran at p. 8; Ex. 3). The employee called a manager and informed her about the Claimant having a gun and stated he was uncomfortable staying in the room with the Claimant. (Tran at p. 10; Ex. 3). When questioned the Claimant confirmed that he carries the gun "everywhere I go." (Tran at p. 9; Ex. 4).

The Employer discharged the Claimant for violating the Employer's work rule pertaining to the possession of firearms, and its general conduct policy. (Tran at p. 2-3; p. 9; p. 11-12; Ex. 4).

### **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.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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

First we deal with the argument that the Claimant was allowed to carry a gun while on company business since it was not on the company “premises.” The flaw in this argument is that the policy clearly says that the list of behaviors is “illustrative of the type of behavior that will not be permitted” and that the list “is not intended to be all-inclusive.” (Ex. 7). It is not reasonable, therefore, to assume that item 4 is somehow all-inclusive on the question of firearms possession. Indeed, item 6 prohibits “sexual harassment or assault of a fellow staff member or customer on company premises.” It cannot be imagined that the Employer would tolerate an employee, on the clock, following a customer out of the bank, out to the sidewalk and then assaulting the customer just because it is not on company premises. Or that the Employer tolerates sexual harassment of co-workers so long as it is on business trips. It being unreasonable to read item 6 as *allowing* such on-duty off-premises conduct, it was patently unreasonable for the Claimant to believe that item 4 had this effect.

In general, any possession of firearms by an employee while at work (other than a security guard or law enforcement officer) is of immediate and grave concern to any employer. Policy or no policy, carrying a firearm while on the company clock is exceptional conduct, to say the least. Also this Employer has a zero tolerance policy for firearms, and such policies are quite common. Against this background, the Employer had an illustrative list of forbidden conduct that included possession of a firearm on the premises. The Claimant’s intentional decision to take his firearm in a company vehicle, on company time, and in the company of co-workers was decidedly the company’s business. The Claimant’s choice to have the gun with him – without even *trying* to get clarification – shows “intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.” 871 IAC 24.32(1)(a). Accordingly we disqualify the Claimant.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

- a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
- b. However, if the decision is subsequently reversed by higher authority:
  - (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
  - (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
  - (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer’s account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

**DECISION:**

The administrative law judge's decision dated February 26, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Monique F. Kuester

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Elizabeth L. Seiser

RRA/ss

**DISSENTING OPINION OF JOHN A. PENO :**

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. I cannot see that the Claimant had anything other than a good faith belief that the Employer's policies did not cover his conduct. While the Employer may have compelling business reasons to terminate the Claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983).

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John A. Peno

RRA/ss