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

SONIA F VILLALBA

Claimant

and

FAWN MANUFACTURING

Employer

HEARING NUMBER: 17BUI-05283

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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Sonia Villalba (Claimant) worked for Fawn Manufacturing (Employer) most recently as a full time Assembler from April 4, 2011, until she was fired on May 4, 2017. On May 2, the Claimant was called into the office and given a disciplinary action for using a rest room out of her area. The disciplinary action was in writing. At one point that document ended up on the floor. The Claimant was told to pick up the piece of paper, and she refused. The Claimant then left the office. Claimant was discharged two days later for refusing to pick up the paper. She was not warned that failure to pick up the paper would result in discharge. She had no prior discipline for anything similar.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) 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 willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

More specifically, continued failure to follow reasonable instructions constitutes misconduct. *See Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *See Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's

reason for non-compliance. *See Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985); *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Good faith is measured by an objective standard of reasonableness.

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). We also note that the three Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We are unable to find that the Employer's testimony established that the Claimant threw the paper on the floor. While Mr. Donahue's testimony was to this effect, it was not so emphatic during the fact finding, as was established on cross-examination. Mr. Peavey testified that the Claimant "took the write-up and threw it on the floor." Yet Mr. Peavey's fact finding statement was that the Claimant threw the paper on the floor in his "opinion." We are not given descriptions of actions – like balling up the paper, or an overhand throw, that supports this opinion. Against this the Claimant testified that she simply did not take the paper and it ended up on the floor. We do not think that the Claimant's version of events is inherently less credible than the Employer's. The Administrative Law Judge opinion is that it makes no sense that Mr. Peavey would yell just because the paper fell, but we think it is not senseless that a manager whose write-up ends up on the floor would get angry at the disciplined worker if in his "opinion" it was thrown - even if that opinion is mistaken. Meanwhile we do not find the language issue to be significant and it plays no role in our analysis. The evidence is, at best, in equipoise and as the Employer has the burden of persuasion we cannot find the Employer has proven that the Claimant threw the paper.

We note that although it is apparent that the Claimant was going to refuse to sign the warning there are requisites for a disqualification based on such a refusal that have not been proven here. *See Green v. IDJS*, 299 N.W.2d 651 (Iowa 1980); *Etcher Farms, Inc. v. Iowa Workforce Development*, 2002 WL 31018409*1 (Iowa App. 2002) (distinguishing *Green* on the basis that in *Green* "it is clear the claimant was informed by her supervisor, and testified she knew, that by signing the reprimand she was merely acknowledging her receipt of the notice.")

This leaves us with the refusal to pick up the paper. We find that the Claimant did refuse to do as

she was told. It is not important whether the refusal was accompanied by "No, you pick it up" or words to that effect, or was silent defiance. The Employer testified, more convincingly than with the throwing, that the Claimant said this, and the Claimant said only that she did not remember saying this. We tend to believe that she did say something along these lines, and can assume for present purposes that she did. One way or the other we have a rather absurd situation with the paper on the floor and both parties refusing to pick it up. Since the Employer has *not* proven that the Claimant threw the paper the case boils down to whether every command from an Employer, no matter how petty the issue, must be obeyed or else misconduct is shown.

We think that the cases cited make clear that the two interests must be balanced. Here the interests of both parties are not ponderous. The Claimant seeks to keep her dignity by not "jumping through hoops" just because the Employer orders it. The Employer meanwhile has the generalized desire of any employer to have workers do as they are told. These interests are present in *any* insubordination case and so is nothing special to this case. We have a situation where the issue is fairly trivial and each party has at stake what perhaps can best be described as "pride." The question is where both interests are minor where to draw the line. "The notion that the Iowa Employment Security Law is to be liberally construed to carry out its humane and beneficial purpose is not an arithmetic rule of certain application, but it does mean that in close cases the benefit of the doubt is in favor of extending benefits to fulfill the purpose of the Act." *Irving v. EAB,* 883 N.W.2d 179, 192 (Iowa 2016). On balance misconduct has not been shown, but at worst an isolated instance of poor judgment.

Now we emphasize the Employer is perfectly free to insist on the Claimant picking up the paper. But while the employer may have its own 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); *Breithaupt v. Employment Appeal Board*, 453 N. W. 2d 532, 535 (Iowa App. 1990); *Miller v. Employment Appeal Bd*., 423 N.W.2d 211, 213 (Iowa App.1988)("[D]istrict court erred in only focusing on whether petitioner's discharge was justified.").

DECISION:

The administrative law judge's decision dated June 8, 2017 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

_____
Kim D. Schmett

_____
Ashley Koopmans

_____
James M. Strohman

RRA/ss