

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

ROGER D HAYWARD :
 :
 : **HEARING NUMBER: 17BIWDUI-135**
 :
 Claimant :
 :
 :
 and :
 : **EMPLOYMENT APPEAL BOARD**
 : **DECISION**
 :
 HERMAN M BROWN CO :
 :
 :
 Employer :

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, 96.5-1

DECISION

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:

The Claimant, Roger D. Hayward, worked for Herman M. Brown Co., from 2003 through August 15, 2016 as a full-time field mechanic earning \$28.55/hour. (17:28-17:45; 30:17-30:39) On October 19, 2014, the Claimant sustained a work-related injury for which he was placed on light duty, and at the same pay rate. (17:54- 18:05; 18:14-18:32; 31:23-32:55) He experienced reduced pay because he could no longer work overtime hours due to his injury. (33:02-33:30) Both parties expected the Claimant to return to the field mechanic position once he fully recovered from his injury. (19:38-20:05) Mr. Hayward worked this position performing light duty, i.e., answering phones, filing, and looking up machine information for personnel in the field for approximately two years. (39:55-40:22; 44:20-45:50)

On August 12, 2016, approximately two weeks after a workers compensation hearing (18:14-18:43; 21:24-23:12; 33:35-33:50; 39:02-39:08), the Employer informed Mr. Hayward that the light duty position was being terminated. (20:44-20:50; 25:27-25:33) The Employer offered him a parts position that paid \$24.21/hour (15:20-15:28; 15:37; 25:18-25:27; 33:58-34:35) and told him to think about it. The following Monday, August 15th, Mr. Hayward told the Employer that he could not accept the significant pay cut; he expected the Employer to offer him another position with comparable pay to the field mechanic's position. Instead the Employer told him "...[he] was laid off, to pick up his stuff and leave the building..." (30:45-31:02; 34:58-36:00; 36:34-36:51; 38:22-38:32) The Employer had no other work available to the Claimant within his restrictions that resulted from his work-related injury. After Mr. Hayward got home, he filed for unemployment benefits. (31:13-31:20; 36:08-36:21)

The Claimant has conducted work searches involving a security guard position, gas station attendant, toll booth operator, and shop manager for maintenance jobs in which he wouldn't have to work with equipment. (36:56-38:13) He has thus far not accepted any position because the pay was significantly lower than what he is required to accept at that time. (41:08-41:44)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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 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. We attribute more weight to the Claimant's version of events. The Employer argues that Mr. Hayward quit. However, "[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). Here, there was no such requisite intention. The Claimant assumed after he turned down the parts position that the Employer would offer him a different position, more aligned with the hourly wage he had been receiving. After all, the only reason he could no longer be a field mechanic was due to his work-related injury. Mr. Hayward fully intended to remain employed working light duty until he could regain his full capacity and return to his original position. When it became apparent that he would not be returning to field mechanic, the Employer initiated measures to move him out of the Claimant's current position and pay, which the Claimant quite understandably could not accept due to the significant pay cut (\$28.55/hour with overtime hours down to only \$24.21/hour).

Mr. Hayward credibly testified that he assumed the Employer would find another position he could work. Instead, after he told the Employer he couldn't accept the parts position, he was directed to pick up his things and leave the premises.

871 IAC 24.1(113) "c" provides:

Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

Based on this record, it is clear it was the Employer who initiated the Claimant's separation from employment. There was no further discussion of any other options available for the Claimant to keep his employment. For this reason, we conclude that the Employer's burden of proving job-related misconduct as the reason for termination was not satisfied.

DECISION:

The administrative law judge's decision dated December 15, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

AMG/fnv