

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

PAYE FEAHN

Claimant,

and

TYSON FRESH MEATS INC

Employer.

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HEARING NUMBER: 11B-UI-06738

**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 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, Paye Feahn, worked for Tyson Fresh Meats, Inc. from April 14, 2010 through April 18, 2011 as a full-time production worker hired to separate chits. (Rec. @ 4:08-4:27; 6:22-6:26; 10:42-10:52; 11:00-11:09: 24:00) Sometimes, the claimant was called to help out in other areas, i.e., separating black gut. (Rec. @ 6:29; 12:02-12:07) Other employees had been specifically trained to separate black gut, and other tasks. (Rec. @ 10:30-10:45; 11:13-11:20; 17:09-17:22)

Mr. Feahn had trouble with his arm when he had to perform this task the first time when he worked this area for approximately one month in March. (Rec. @ 8:22: 12:28-12:34; 13:33; 14:48-15:15) The claimant became sick with pain in his arm for which his supervisor (Dean Shelf - Rec. @ 13:53) referred

him to the company nurse who gave him medication and advised him not to separate black gut. (Rec. @ 12:35-12:53; 13:39; 15:18-15:26; 15:33-15:50) The nurse provided him with documentation that he signed and submitted to his supervisor, who no longer assigned him to work with separating black gut. (Rec. @ 12:55-13:04; 15:52-16:00)

On April 15th, 2011, Mr. Feahn was assigned to separate black gut. (Rec. @ 16:16-16:37) He spoke with Mr. Shelf about his concern regarding his arm getting sore, again. (Tr. 8:22: 24:15-24:17) His supervisor explained that they were short-staffed and he needed him to comply. (Rec. @ 5:02- 5:14; 5:47-5: 53; 8:43-8:50; 17:08; 22:29-22:57) Mr. Feahn reminded Shelf that he was told by the company nurse that he shouldn't perform this work. (Rec. @ 16:40-16:48) Mr. Shelf told him that if he didn't do it, he would have to terminate him. (Rec. @ 16:46-16:51: 23:07) The claimant asked to go see the company nurse to which his supervisor declined his request. (Rec. @ 16:51-16:56) His supervisor directed him to go to the office, at which time the employer placed him on suspension pending his return the following Monday at 10:00 a.m. for a meeting. (Rec. @ 5:57-6:03) This was the first time Mr. Feahn ever refused to comply with the supervisor's request. (Rec. @ 9:33-9:39; 22:29; 22:42)

That Monday, the Employer terminated him for refusing to perform his job assignment. (Rec. @ 10:02-10:14)

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).

Mr. Feahn provided credible testimony that he was hired and trained to work the position of separating chits. Although the employer disagrees, the claimant vehemently denied that he was ever trained to perform any other job, namely, separating black guts. The prior injury the claimant sustained, as a result of his separating black gut, left him understandably reluctant to perform that task, again. Additionally, he sought medical attention from the company nurse, who provided him with medicine and documentation to release him from that particular job task. (Rec. @ 12:35-12:53; 13:39; 15:18-15:26; 15:33-15:50) While the claimant did not present this documentation at the hearing, the employer did acknowledge that he had seen the company nurse, which lends further credibility to the claimant's testimony. Although the claimant refused to comply with his supervisor's directive, he did so pending his request to see the nurse again for her input when asked to separate black gut again. 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). Good faith under this standard is not determined by the Petitioner's subjective understanding. Good faith is measured by an objective standard of reasonableness. "The key question is what a reasonable person would have believed under the circumstances." Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988); accord O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993) (objective good faith is test in quits for good cause).

Mr. Feahn's request to see the nurse was in good faith and not unreasonable in light of the claimant's valid concern for re-injuring his arm. When the employer disallowed him to see her (Rec. @ 16:51-16:56), his refusal to take on the April 15th directive, although seemingly insubordinate, was not without legitimate concern. Both parties agree that this was the only instance in which the claimant ever refused to follow his supervisor's directive. (Rec. @ 9:33-9:39; 22:29; 22:42) "In order to be disqualified from benefits for a single incident of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect of employees." Diggs v. Employment Appeal Board, 478 N.W.2d 432, 434 Iowa App. 1991) (citing Henry, 391 N.W.2d at 736). "However, an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause." *Id.* (citing Woods v. Iowa Dept. of Job Service, 327 [N.W.2d](#) 768, 771 (Iowa App. 1982)).

Based on this record, we conclude that the claimant's refusal to separate black gut was done in good faith and was not done intentionally to cause harm to the employer's interests. If Mr. Feahn had done as directed, he would have re-injured his arm, which could have conceivably taken him off work altogether for some time. In addition, given the employer's failure to provide the claimant's supervisor as a firsthand witness at the hearing, we attribute more weight to the claimant's version of events. In looking as this record as a whole, the employer has failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated June 24, 2011 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

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.

Monique F. Kuester

AMG/kk