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

AJIT V JANI	:	
	:	**HEARING NUMBER:** 10B-UI-09143
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
AMERICAN BAPTIST HOMES OF MIDWEST	:	
Employer.		

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 Claimanat 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:

Ajit Jani (Claimant) worked for American Baptist Homes (Employer) as a full-time consumer support staff from August 17, 2006 until he was fired on April 22, 2010. (Tran at p. 2; p. 10; Ex. 1). The Employer operates a 24-hour facility for people with mental retardation/developmental disabilities, although apparently not as a licensed care facility. (Tran

at p. 2; *see* Ex 1 [DHS involvement rather than DIA]). In his position the Claimant was responsible

for supervising dependent adults. (Tran at p. 3). On April 13, 2010 the Claimant took three dependent adults to Wal-Mart. (Tran at p. 3; p. 10; Ex. 1; Ex. 2). The Claimant has diabetes. (Tran at p. 10; p. 15; Ex 1 p. 4-5). One of his symptoms can be a sudden uncontrollable urge to urinate. (Ex. 1, p. 4-5). While at Wal-Mart he had a sudden pain accompanying an urge to urinate. (Tran at p. 9-10; p. 13). The Employer had no specific policy governing such a situation, but expects its employees to use their best judgment. (Tran at p. 8). The Claimant chose to leave the three alone for 5 minutes while he relieved himself. (Tran at p. 3; p. 5; p. 11-12; Ex. 1). When he returned he was unable to locate the three. (Tran at p. 3; Ex. 1; Ex. 2). He looked for them at Burger King, as they had previously decided they would eat there. (Tran at p. 3; p. 10; p. 11; p. 13; Ex 2). He found them at Burger King after a total time of about 15 minutes. (Tran at p. 3; p. 5; p. 11; p. 12; Ex 1; Ex 2). The Employer terminated the Claimant over this incident. (Tran at p. 3; p. 5; p. 6; p. 8-9; Ex. 1). The Claimant had no previous warnings for anything similar. (Tran at p. 4; p. 8; p. 13).

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:
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> 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).

First of all, the Claimant was simply not capable of effecting the best alternative: hold his urine. The Claimant's health condition, beyond his control, prevented this. Since a simple incapacity is not misconduct, the Claimant is not disqualified for doing what he was unable to do. 871 IAC 24.32(1)(a); *Eaton v. Iowa Dept. of Job Service*, 376 N.W.2d 915, 917 (Iowa App. 1985); *Newman v. IDJS*, 351 N.W2d 806 (Iowa 1984); *Richers v. Iowa Department of Job Service*, 479 N.W.2d 308 (Iowa 1991). It is true the Claimant may have had options, such as finding a trustworthy party to care for his charges. Or he might have gathered the three together and brought them with him. But how long any of this might have taken cannot be known - and the accident may very well have occurred in the interim. Given the uncertain alternatives, the urgency, and the undesirable outcome to be avoided, the Claimant in this matter is guilty of no more than "good faith errors in judgment" in an isolated instance. 871 IAC 24.32(1)(a). A single instance of poor judgment is not misconduct. *Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App.1986); 871 IAC 24.32(1)(a). He should therefore not be disqualified for misconduct.

The Board understands that caring for dependent adults is of the utmost importance. We also appreciate that state regulations may be implicated. This is often the case. Food safety regulations, medical standards, rules of the road, gambling regulations, financial regulations, debt collection laws, and privacy regulations are a few examples of the sort of laws that are frequently involved in cases where an employee has been negligent in an isolated instance. In Lee itself the claimant doubtlessly violated the duty to keep a proper lookout while driving. We do not question the decision to terminate a worker for a poor decision when responsible for dependent adults, especially when that decision had the *potential* to violate state regulations. This may very well be a compelling reason for a termination. But 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). Thus, in any case, the issue is not the importance of the policy the Claimant violated. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed intentional misconduct or repeated negligence of equal culpability. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated August 13, 2010 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.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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

RRA/fnv

ORDER REGARDING EXHIBITS:

The Employment Appeal Board hereby places under seal the findings located in Exhibit 1 at pages 13-15 and pages 21-23. This Board has access to this information pursuant to Iowa Code §235B.6(2)"d"(4). Redissemination of this information is, however, closely regulated. Iowa Code §235B.8. Redissemination of information in violation of this provision is a crime. Iowa Code §235B.12. To comply with Iowa's criminal law, therefore, the Board seals all Dependant Adult Abuse information found in its records and restrict access thereto to those authorized by law and in accordance with Iowa Code §235B.8.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv