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

MYYASHIANNA WILLIAMSON Claimant and **HUMACH LLC** Employer	:	**HEARING NUMBER:** 18BUI-12352 **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: 96.5-1

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:

Myyashianna Williamson (Claimant) was employed as a full-time member relations specialist for Humach LLC (Employer) from April 24, 2017 to November 3, 2017. She was given a choice to accept a demotion or risk being fired if she did not satisfy conditions she was very unlikely to satisfy.

The Claimant was working on a client account that required she have an 85 percent compliance score. She had not met that level of compliance since her first month of employment when she was still in training.

On September 15, 2017, the Claimant received a final written warning for her compliance scores and was notified her employment would be terminated if she did not meet the goal that month. The Claimant did not meet the goal but asked the employer to continue her employment. The Employer decided to give the Claimant another month.

On October 31, 2017, the Claimant emailed the call center supervisor and stated she understood her compliance scores were low but asked that the Employer not terminate her for compliance. The employer replied there were also attendance and procedural issues as well. The Employer talked to the Claimant's supervisor at which time the Claimant's compliance score was 76 percent for October 2017. The final compliance scores for October 2017 were scheduled to be released November 6, 2017. Because the client conducts the monitoring that determines whether employees are allowed to stay and remain on the account, the Employer knew it would be difficult, if not impossible, for the Claimant to meet the 85 percent goal because there was no guarantee the client would score the Claimant again that month.

The Claimant's supervisor met with her and explained those facts. The Claimant was told that it was "very unlikely" she would meet the goal, and if she did not the Employer would have to let her go. The Claimant's supervisor told the Claimant her sales skills were strong and it was starting training for another account Monday, November 6, 2017. The Employer asked the Claimant if she wanted to participate in that class even though the pay would be $10.00 per hour rather than the $13.50 she was earning with the weekend differential. The Claimant stated she would need to speak to her husband over her break and let her supervisor know her decision. After break, the Claimant went to human resources and turned in her badge. The human resources employee asked the Claimant if her supervisor was aware she was resigning and the Claimant said yes. The Claimant rejected the demotion because of the pay reduction. In the end the client completed no further monitoring on the Claimant even though it was unaware that the Claimant was no longer working there. The Claimant's final score thus would not have met the 85% goal.

REASONING AND CONCLUSIONS OF LAW:

Quit Analysis:

The rules of the Department provide that it is not disqualifying if "[t]he claimant was compelled to resign when given the choice of resigning or being discharged. [and that] [t]his shall not be considered a voluntary leaving." 871 IAC 24.26(21). Furthermore, a substantial change in the contract of hire is also good cause for leaving. 871 IAC 24.26(1). "Change in the contract of hire" means a substantial change in the terms or conditions of employment. *See Wiese v. Iowa Dept. of Job Service*, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. *See Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. *Id.* The test is whether a reasonable person would have quit under the circumstances. *See Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988); *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993). Under *Barber v. EAB*, No. 0-820 (Iowa App. 11/24/2010) "a notice of intent to quit is not required when the employee quits due to a change in the contract of hire…." *Baber*, slip op. at 9

The first question then is whether the Claimant had a realistic option of staying on in her usual job. If she did then her quit is a voluntary one, and would be disqualifying under rule 24.25(33): "The claimant left because such claimant felt that the job performance was not to the satisfaction of the employer; provided, the employer had not requested the claimant to leave and continued work was available." Here we find that there was no realistic chance of "continued work [being] available" and that in reality this is a case of "demote or be fired". The Claimant had never consistently satisfied the standard, and even the Employer doubted she would satisfy it this time. The possibility that the Claimant could stay on in her position was remote, at best.

In the context of this case the next issue is whether being asked to quit your *position* in lieu of discharge is disqualifying if you are offered a position that constitutes a substantial reduction in pay. We think it is not. We think that a Claimant who is told “demote or be fired” is on the same footing as one told “quit or be fired” where the demotion constitutes a substantial change in the contract of hire. Were it otherwise, employers who want to fire someone for non-disqualifying reasons could avoid benefits merely by giving a choice between a substantial demotion or quitting. To avoid this a Claimant should be allowed benefits if the choice is prompted by non-disqualifying reasons, but denied them if misconduct caused the Employer to make the offer.

We find that the Claimant faced a choice between taking a demotion that constituted a substantial change in the contract of hire, or chance the remote possibility that she could keep her current job. We find that the Claimant had no realistic chance of staying in her current job. She was not required to accept the demotion since it was a substantial change in contract. Thus if we treated the issue as a quit it would be a quit for good cause, *unless* the demotion was justified by misconduct committed by the Claimant. We thus turn to that issue.

Misconduct Analysis:

Iowa Code Section 96.5(2)(a) (2018) 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).

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). 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 have found credible the Claimant's testimony that she did not intentionally fail to meet the standards imposed by her Employer.

The Employer has not proven that this is a case of a "deliberate act or omission". 871 IAC 24.32(1)(a). Since there was no intentional misconduct, disqualification could be justified only if the Claimant's errors were "carelessness or negligence of such degree of recurrence as to manifest equal culpability…or to show an intentional and substantial disregard of the employer's interests." Id. When an allegation of misconduct is based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Carelessness may be considered misconduct when an employee commits repeated instances of ordinary carelessness. Where the employee has been repeatedly warned about the careless behavior, but continues with the same careless behavior, the repetition of the careless behavior may constitute misconduct. *See Greene v. Employment Appeal Board*, 426 N.W.2d 659, 661-662 (Iowa App. 1988). "[M]ere negligence is not enough to constitute misconduct." Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000).

Here this is at worst a case of poor performance. The greater weight of the evidence supports that the Claimant's struggles were a failure of capacity rather than the result of a decision not to exercise reasonable care. Mere incapacity or incompetence is not disqualifying. 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); *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552 (Iowa App. 1986). In order to prove that poor performance alone disqualifies a Claimant, what is required is proof that the poor performance was more than mere negligence or lack of skill. What is required is "quantifiable or objective evidence that shows [the

Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board*, 616 NW2d 661, 668 (Iowa 2000). Here

we have no objective proof that the Claimant was intentionally underperforming, or showing a lack of care about her performance, but only that she wasn't doing the job to the level that the Employer felt it needed. We find that the Claimant tried her best but her best was not good enough. This is not disqualifying.

DECISION:

The administrative law judge's decision dated December 29, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv