BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov

JONATHAN L WILKENS		
	: **APPEAL NUMBER:**	23B-UI-02052
Claimant	: **ALJ HEARING NUMBER:**	23A-UI-02052
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
BRAD PIETZSCH INSURANCE AGENCY	:	
	:	
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: 96.5-1, 24.32-1A

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:

Jonathan Wilkens (Claimant) worked for Brad Pietzsch (Employer) as a full-time protégé insurance salesman from September 20, 2022, until this employment ended on January 16, 2023.

The Claimant reported directly to Brad Pietzsch, the owner. The Claimant worked a set schedule Mondays through Fridays from 8:00 a.m. to 5:00 p.m. The Claimant did not have experience as an insurance salesman when he was hired. However, the Claimant was provided training both on a program and on-the-job training provided by Lead William Navarro. The Claimant was given a sales expectation to hit, while under the mentorship of staff working for the Employer before becoming a full-fledged agent.

On December 20, 2022, Mr. Pietzsch observed that the Claimant was falling far short of those expectations. Rather than terminating him at that time, Mr. Pietzsch issued the Claimant a performance expectation letter extending the timeframe for the performance expectation. The letter said the claimant must hit the expected sales goal by the end of January 17, 2023, or he would be terminated.

At the end of his shift on January 16, 2023, the Claimant turned in his keys and other items to Mr. Pietzsch. The Claimant explained that he did not feel like he would be able to hit the sales expectations. Mr. Pietzsch accepted these items and processed his separation on that day.

The greater weight of the evidence establishes that at the time the Claimant turned in his resignation, he was virtually certain to be fired the next day. Short of a miraculous increase in sales the Claimant was not going to meet the required sales goal by the end of January 17. The greater weight of the evidence shows that if the Claimant did not meet this sales target by the end of January 17, 2023 then he certainly would be discharged by the Employer. The Claimant thus had no reasonable expectation of continued employment with the Employer beyond January 17, 2023.

REASONING AND CONCLUSIONS OF LAW:

As an initial matter, we disavow the Administrative Law Judge's negative description of the Employer's behavior during the hearing. We did not find either Employer or Claimant to have acted inappropriately during the course of the hearing. Generally, the hearing was unremarkable.

Evidentiary Issues

The Employer offered exhibits to the Administrative Law Judge which were denied. The Claimant now submits those documents as supporting the Claimant. While it might make sense under the circumstances to go ahead and consider the documents, we do not do so. Examining the documents, we conclude that they make no difference to our decision. They do support our conclusion that the Claimant's employment was, as a practical matter, doomed by the time he resigned. They also support that the termination of employment occurred because of a lack of capacity of the Claimant. But since the record as developed is sufficient, out of respect for the process we will not consider the new evidence submitted by the Claimant and give it no weight whatsoever. To be clear, however, if we considered the new evidence (and/or the proposed exhibits offered by the Employer), we would not change our decision.

As far as a *Crosser* inference, it makes no sense to infer that the documents which the Employer *tried to get into the record* would be adverse simply based on a procedural slip-up by the Employer. *Crosser* applies when relevant evidence is not produced by a party who has access to it, and there is no ready explanation for the failure to produce the evidence. Here the ready explanation is that the Employer lacked familiarity with the process, and did not adequately read the notice of hearing. Regrettably, this happens a lot. There is no reason whatsoever to conclude that the Employer was trying to hide adverse evidence. We decline Claimant's invitation to draw an adverse inference.

Voluntary Quit not Shown:

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: Voluntary Quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Generally, a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

Since the Employer had the burden of proving disqualification, the Employer had the burden of proving that a quit rather than a discharge has taken place. The Iowa Supreme Court has thus been explicit: "the employer has the burden of proving that a claimant's departure from employment was voluntary." *Irving v. Employment Appeal Bd.*, 883 NW 2d 179, 210 (Iowa 2016). On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2).

"[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).

It is not uncommon for employees who quit to claim that the Employer actually fired them or laid them off. In such cases even courts that allow benefits examine the actions of the employer to determine whether the employer actually did anything that could be construed to be a termination initiated by the employer. Although there is no published Iowa case on point, guidance in Iowa comes from the unpublished Court of Appeals decision in *LaGrange v. IDJS,* (Iowa App. June 26, 1984). There the employee was sent to an alcohol abuse counselor and ordered to take antabuse, a drug which makes it impossible to drink alcohol. The employee told his counselor that he planned on not taking the medication during the weekends so that he could drink. The counselor spoke to the employer about this and then relayed to the employee that his plan was unacceptable to the employer. After this the employee was at a bar where his boss was present. He bought himself a beer and one for his boss and then drank his beer. The employer did not tell the employee that he was terminated but the employee assumed that he was. The Court of Appeals ruled that the fact that the employee was mistaken about whether he would be terminated did not negate the fact that he had voluntarily quit. *LaGrange* slip op. at 5. On the other hand, in *Bartelt v. EAB,* 494 N.W.2d 684 (1993) a corporate president filed a voluntary petition for bankruptcy and became unemployed. The agency called this a voluntary leaving of employment. The Supreme Court of Iowa found it was not so. The Court found that the filing of the petition was not voluntary, and allowed benefits because even though "[the bankruptcy petition] was officially a voluntary petition, [B]artelt had no practical choice in the matter. Involuntary bankruptcy was surely only a few days off." *Bartelt* at 685.

Cases from other jurisdictions are generally in agreement that a termination or lay off does not take place unless a reasonable person in the employee's position would conclude that he was terminated. See *e.g. Keast v. Unemployment Compensation Board of Review,* 94 Pa.Cmwlth. 346, 503 A.2d 507 (1986)(requiring that "language used by an employer possesses the immediacy and finality of a firing"

before employee could recover benefits based on mistaken quit); *Goddard v E G & G Rocky Flats* 888 P2d 369 (Colo App, 1994); *Bowen v. District of Columbia Dept. of Employment Services,* 486 A2d 694 (D.C. App. 1985)(discipline/warning not a termination); *Morgan v. Unemployment Ins. Appeals Bd. 6 Cal Rptr* 2d 34 (Cal. App., 4th Dist 1992)(same); *Spatola v Board of Review*, 72 NJ Super 483, 178 A2d 635 (1962)(same). Another analogous area is where a worker resigns as part of a buyout. In those cases an employer is facing layoffs, and the claimant takes a buyout rather than risk job loss. In such cases the Courts commonly apply a test requiring objective facts showing that job loss was imminent. *See e.g. Brady v. Board of Review*, 704 A. 2d 547 (N.J. Sup. 1997)(setting out two part test and citing cases and explaining benefits are generally only allowed when there are objective facts supporting conclusion that if the resignation had not taken place layoff was imminent); *Childress v. Muzzle*, 663 SE 2d 583 (W. Va. 2008)(adopting Brady test).

Putting these cases together, including *LaGrange* and *Bartelt*, there is a clear rule that if a worker quits in the face of what objective facts show to be imminent job loss then that worker would ordinarily be denied benefits only between the time of the quit and the pending job loss. See 871 IAC 24.25(40)(quit in advance of the announced scheduled layoff disqualifies only from the last day worked to the date of the scheduled layoff). Here it was clear at the time the Claimant quit that he had no realistic possibility of meeting the necessary targets. Even the Employer gave frank testimony that he did not expect that the Claimant could have met the goal by the end of the next day. This being the case, termination was to be the result. As in *Bartelt* the Claimant "had no practical choice in the matter. Involuntary [job loss] was surely only a …da[y] off." *Bartelt* at 685. We conclude this was a quit in lieu of termination, and thus must analyze it as a termination case.

Misconduct Analysis:

Iowa Code Section 96.5 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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> a. 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.
>
> ….
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> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 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. Misconduct by an individual includes but is not limited to all of the following:
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> (1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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); Iowa Code §96.6(1). 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 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, lack of effort, or otherwise not following directives. 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 capacity. 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 performance, but only that he wasn't doing the job to the level that the program required. We find that the Claimant tried his best but his best was not good enough. This is not disqualifying.

DECISION:

The administrative law judge's decision dated March 23, 2023 is **REVERSED**. The Employment Appeal Board concludes that the Claimant did not voluntarily leave employment but instead was terminated. The Employer did not show that the termination was for misconduct and accordingly, benefits are allowed. The overpayment entered against claimant in the amount of $3,897 is vacated and set aside.

Although it had no influence whatsoever on our decision we note, solely for the edification of the Employer, that **this Employer** is not in the base period of the current claim and therefore **is not chargeable on the current claim**.

_____
James M. Strohman

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Ashley R. Koopmans

_____
Myron R. Linn

RRA/fnv