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

GERALD L JOHNSON	:	
	:	HEARING NUMBER: 09B-UI-04180
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
HEALTH CARE SERVICES GROUP INC	:	
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 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant worked for Health Care Services Group, Inc. (Employer) as a full-time laundry worker from October 29, 2007 until the date of his discharge on February 12, 2009. (Tran at p. 2-3; p. 5-6). The Claimant had performed the duties in question, on a contract basis, for about six years prior. (Tran at p. 2; p. 14). He worked full time doing the folding and delivery of laundry at the employer's Store City long-term care nursing facility client. (Tran at p. 2-3; p. 5-6; p. 15).

The Claimant received written counseling on December 17, 2008 and on January 30, 2009. (Tran at p. 9-10; p. 11). These concerned the Claimant's need to perform his job in a timely and thorough manner. (Tran at p. 9-10; p. 11; p. 21).

On February 11 the Claimant was complaining to Ms. Brown, the housekeeping and laundry manager, about there being too much work for him to do. (Tran at p. 6; p. 8). He also complained that there were too many unnecessary items being required for the carts. (Tran at p. 7; p. 17). Ms. Brown retorted that if he would spend his time doing the work and stop complaining he could get the work done quicker. (Tran at p. 6).

The Claimant returned to the laundry room, and continued to complain. (Tran at p. 7; p. 8). The employer discharged the Claimant the next day with the stated reason of repeated complaining, neglect of duties, and insubordination. (Tran at p. 2-3; p. 5-6; p. 15).

The Employer has failed to prove by a preponderance of the evidence that the Claimant was yelling during his last day. (Tran at p. 7; p. 9 [passerby could not hear what was said]; p. 16). The Employer has not shown that Claimant did anything more than raise his voice as necessary to be heard over noise and distance. (Tran at p. 16; p. 18). The Employer has also failed to prove that the Claimant said "to hell with it" or anything similar. (Tran at p. 19).

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: 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.

"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). In consonance with this, the law provides:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); accord Ray v. Iowa Dept. of Job Service, 398 N.W2d 191, 194 (Iowa App. 1986); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 509, 510 (Iowa App. 1985).

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).

An employer has the right to expect decency and civility from its employees and an employee's use of confrontational language or manner of speech may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). But even then, the "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors. . . ." Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990).

Application of Standards: The facts we have found support neither a conclusion of disqualifying insubordination nor a conclusion that the Claimant's use of language was misconduct.

On insubordination, the Claimant expressed dissatisfaction with his work load but was on his way to the laundry room to do the work. He in fact folded a lot of laundry as he had for years. (Tran at p. 17; p.

21-22). This is not a refusal to work and so is not refusal to follow instructions.

On the issue of the Claimant's behavior, the Employer has failed to prove anything extreme enough to be disqualifying. The Board recognizes the importance of controlling the use of disrespectful language to supervisors at the work place. Undermining a supervisor's authority can lead to a serious impairment of workplace efficiency. We do not, therefore, wish to imply that speaking disrespectfully toward one's supervisor could never be misconduct. On the contrary, such behavior will often be misconduct. Myers v. Employment Appeal Board, 462 N.W.2d 734 (Iowa App. 1990). But the burden will still be on the employer to prove it and the decision will be one based on the individual facts of each case. Here the Employer has failed to prove that the Claimant was yelling *at* his supervisor rather than merely raising his voice over the noise. Also the Employer has failed to prove that the Claimant cursed at the supervisor. The testimony on this point was in equipoise and we have thus found that the Employer did not prove cursing by a greater weight of the evidence. This leaves only the Claimant's rather persistent complaining, but this, even given his prior discipline, is not a sufficient disregard of the Employer's interests to be misconduct.

Yet even if we were to credit the Employer's testimony over the Claimant's denial the most the Employer proved was that the Claimant said *to himself*, as he turned away from Ms. Brown, "to hell with it all." (Tran at p. 6; p. 8; p. 13). Even if we believed this to be what happened still we would not find misconduct. Based on these facts, and even considering the Claimant's discipline history, we could not find that this was more than an isolated instance of poor judgment that should not disqualify the Claimant from benefits. 871 IAC 24.32(1)(a).

Finally, to the extent that poor performance played a role in the Employer's decision we find that misconduct is not proved. In general, poor performance is not misconduct. To find performance problems disqualifying we need "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). The evidence in this case comes far short of showing this. (Tran at p. 21-23; p. 25).

DECISION:

The administrative law judge's decision dated April 15, 2009 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

_____
Elizabeth L. Seiser

RRA/ss

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/ss