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

JOHN M HAINGA-SIMSSI	:	
	:	**HEARING NUMBER:** 16B-UI-10144
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
IAC IOWA CITY LLC	:	
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, 96.3-7

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:

John Hainga-Simssi (Claimant) worked for IAC Iowa City LLC (Employer) full-time as a finish operator from April 24, 2015 until he was fired on July 28, 2016.

The Claimant was granted short-term disability and because he was on short-term disability, he was approved to be on Family and Medical Leave Act (FMLA) leave. Claimant was initially on FMLA leave from May 28, 2016 through June 24, 2016. The FMLA leave was extended until July 17, 2016 because Claimant's short-term disability was extended. The Employer uses a third party to administer its short-term disability.

After July 17, 2016, the Employer did not receive any updates from the short-term disability provider and did not have any contact from Claimant until it received an e-mail on July 27, 2016.

The Employer has a policy that employees, including Claimant, have to provide documentation to extend their leave. On July 25, 2016, the Employer sent a letter to Claimant requesting updated documentation regarding his need to be off of work. The Claimant responded by sending an e-mail on July 27, 2016 from a Moline Library g-mail account. The July 27, 2016 e-mail only consisted of an attachment; there was no explanation in the e-mail. The attachment was a doctor's note written in French. Claimant did not provide a translation or an explanation with the doctor's note.

The Employer terminated the Claimant because it would not accept the note written in French. Although the Employer could have terminated the Claimant earlier, based on its attendance policy, the Employer did not terminate the Claimant before July 28. The precipitating "but for" cause of the termination was the Claimant's failure to supply a doctor's note in a language the Employer could understand.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) 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).

We face here a Claimant who likely would have been disqualified if terminated earlier, but who was not in fact terminated until he had sent in the doctor's note in French. To be clear, the Claimant's confusion between the 27th and the 17th would not in our minds excuse his failure to report for ten days. Had the Employer terminated at that point, we would likely disqualify. But the Employer did not. Rather, the Employer sent a letter on the 25th asking for updated medical documentation for the Claimant's continued time off work. Manifestly, then the Employer had not decided to terminate as of the 25th. It was only after deciding the documentation was inadequate that the Employer terminated. If, as asserted at hearing, the Employer would have terminated anyway, why did it seek documentation on the 25th? The Employer has failed to prove that the Claimant would have been terminated for his attendance alone.

Allegations of wrongdoing cannot be used as a basis of disqualification if they did not actually motivate the termination. The reason behind this is the basic statutory provision that disqualifies a claimant for benefits only if "the individual has been discharged for misconduct in connection with the individual's employment." Iowa Code §96.5(2)"a". That this requires a causal connection is clear not only from the plain meaning of paragraph but also from paragraph "c" of that section. In paragraph "c" the worst kind of misconduct is dealt with. Under that paragraph disqualification may be imposed, even after a previous qualification decision had already been made, if the misconduct is "gross misconduct", that is, conduct in violation of the criminal code. But it is not enough that the claimant have committed a crime. If must be that the "claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment." Iowa Code §96.5(2)"a". Thus the legislature has made clear that to be disqualified a claimant not only must commit misconduct, or even gross misconduct, but must have lost employment because of that misconduct.

The requirement of a causal connection between the alleged disqualifying misconduct and the termination of employment has been repeatedly made clear by the Iowa Supreme Court. For example, in *West v. Employment Appeal Board*, 489 N.W.2d 731(Iowa 1992) the employer asserted that the claimant was disqualified because she failed to answer questions that had been put to her. The Iowa Supreme Court stated that "an employer must establish that the employer discharged the claimant because of *a specific act or acts of misconduct*." *West* at 734 (emphasis in original). The requirement of causality was so essential that the Court refused to even address whether or not the claimant had committed misconduct by refusing to answer the questions. The Court found that "[b]ecause the school district failed to prove a direct causal connection between the discharge and West's refusal to answer the questions, we do not reach the issue whether such refusal constitutes misconduct." *Id.* Likewise in *Larson v. Employment Appeal Bd*., 474 N.W.2d 570 (Iowa 1991) the Supreme Court refused to disqualify the claimant based on deceit since the termination was not based on that deceit. In explaining its decision to allow benefits the Court wrote "a careful reading of this record reveals that Larson was fired for her incompetence, not for her deceit. Any

claim that she was fired for deceit in applying for employment was a later idea, supplied after the fact of her termination." *Larson* at 572. In a nutshell "[t]hough she might have been, Larson was not fired for her deceit", *Id.,* and therefore the existence of deceit could not disqualify the claimant. Finally, in *Lee v. Employment Appeal Board*, 616 N.W.2d 661(Iowa 2000) the Board had disqualified the claimant because the claimant refused to consider a suspension and drug testing as discipline from the employer. The Court found this could not be misconduct:

> [T]he agency should not have relied on this evidence because Lee was not discharged because he refused to accept a two-week suspension and undergo drug testing four times a year. . . .Lee's refusal occurred after the last incident that gave rise to the employer's decision to discharge him. Therefore, Lee's refusal had nothing to do with the reason the county discharged him. The employer cannot now rely on such refusal as additional proof of misconduct.
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> *Lee* at 669.

Applying this precedent it is not enough that the Claimant could have been fired for the work he missed before the 27th. The fact is, the Claimant wasn't. "Could have" reasons are not good enough to disqualify a claimant if they did not actually result in the termination. *Larson* at 572.

We thus can disqualify this Claimant only if we can find that his failure to explain or translate his French language doctor's documentation was an act of misconduct. This we cannot do. The Claimant himself speaks French. The failure to communicate better about the note was merely a good faith error of judgment, not a willful and wanton disregard of the Employer's interests. Even considering this final act in the context of all the other attendance issues for this Claimant, still we cannot find that the last act rises to the level of misconduct. Since this was the current and precipitating cause of the termination, we allow benefits.

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. *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552, 554 (Iowa App. 1986); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983); *Newman v. Iowa Dept. of Job Service*, 351 N.W.2d 806, 808 (Iowa App. 1984). We conclude that misconduct was not shown and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated October 12, 2016 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.

Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being

presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

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Ashley R. Koopmans

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James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

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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Kim D. Schmett

RRA/fnv