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

T J RICE	:	
	:	
Claimant,	:	**HEARING NUMBER:** 15B-UI-13368
	:	
and	:	
	:	**EMPLOYMENT APPEAL BOARD**
WAL-MART STORES INC	:	**DECISION**
	:	
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. 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:

TJ Rice (Claimant) worked for Wal-Mart Stores (Employer) as a full-time tire and lube express shop manager from July 15, 2008 until she was fired on December 2, 2014. Under the Employer policies its employees are expected to keep personal property in lockers or other designated areas. The Claimant had for most of her employment kept her purse in the changing room in a box provided there for employee clothing. Other workers in the area commonly kept their clothes, including valuables such as wallets, in those boxes. The Claimant worked on Thanksgiving, November 27, 2014 until 11 p.m. She was told that day that she needed to leave her purse in the employee locker. The Employer failed to prove by a preponderance of the evidence that the Claimant had been told this, or anything similar to this, on any prior occasion. On November 28, 2014, commonly referred to as “Black Friday,” the Claimant came to work at 5:30 a.m. She did not place her purse in the employee locker because she forgot. The day was hectic because they were having a tire sale. She left her purse in the employee changing room. She was then fired for this in the context of her prior warnings. The record does not establish what the prior warnings were for.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) 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).

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. We have found credible the Claimant's evidence that she was unaware, until Thanksgiving, of the policy requiring her to keep her purse in the Employee locker.

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 can

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). When the issue is poor performance, 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). Where we are looking at an alleged pattern of negligence we consider the previous incidents when deciding if there is indeed a "degree of recurrence" that evidences the necessary culpability.

Here we have found credible that the Claimant first learned of the rule in question on November 27. This means her leaving her purse in the changing room on the 28th was the first instance of such a transgression after the Claimant first learned about the requirement. The Employer has not proven that the Claimant intentionally violated policy, and it is therefore a case of negligence. We have *no* proof of what prior transgressions of any sort that the Claimant may have had. Where the Claimant has for *years* been doing the same thing, and other workers also, we do not charge against her prior instances of violating the personal property policy. The policy has not been proven to have been previously enforced, and so we find only one instance of a negligent violation of the policy following notice that the policy would now be enforced. One instance of negligence is not repeated and so misconduct based on negligence is not proven.

The Claimant is a long-time employee, she was working heavy days, following a late night on Thanksgiving with an early morning on Black Friday. It was an understandable lapse that she forgot about what was to her a new requirement. Further it would not be immediately obvious to an honest employee why leaving *her* purse in the changing room would be of concern to her *employer*, thus making it easier for such a thing to slip one's mind. We note, as we have often done, that 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). This case falls into that category and we accordingly allow benefits today.

DECISION:

The administrative law judge's decision dated January 22, 2015 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.

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law

judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Kim D. Schmett

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Ashley Koopmans

_____
James M. Strohman

RRA/ss
DATED AND MAILED _____

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