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

SHERRI D MARION	:	
	:	**HEARING NUMBER:** 17BIWDUI-146
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
IOWA WORKFORCE DEVELOPMENT	:	
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, 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer 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:

Sherri D. Marion (Claimant) worked for IWD (Employer) most recently as a full-time Workforce Advisor from February 11, 1997 until she was fired July 26, 2016. Under the Employer's policies staff in the Claimant's position who wanted to attend a conference without using vacation was required to ask for permission from his or her supervisor. The Employer's work rules prohibit employees from deliberate and willful refusal to follow the directives of a supervisor. Also the rules prohibit lying during an investigation.

Dave Brown was Claimant's direct manager. Mr. Brown's direct manager was Jennifer Reha. Ms. Reha's direct manager was Jason Landess. Mr. Landess' direct manager was Marketa Oliver. Claimant knew that her chain of command began with Dave Brown, then Ms. Reha, to be followed by Mr. Landess, then Marketa Oliver and, finally, the executive director of Workforce Development, Elizabeth Townsend.

IWD held an "IowaWorks Integrated Spring Meeting" at the Forte Banquet Conference center on May 12 and 13, 2016. Prior to the conference, Jennifer Reha asked Dave Brown to attend and to select a few employees to accompany him. Mr. Brown notified one of the organizers of the conference he and three other employees would attend. Claimant was not selected to attend the conference. No one discussed the conference with her nor did she even know it was taking place until the first day of the event.

During the afternoon of May 12, 2016, Claimant discovered the conference had begun that morning. She found out about the conference from Business Market Specialist Vonnie Kai-Stewart during a conversation initiated by Claimant who was trying to locate Craig Immerfall. Claimant stated that Kai-Stewart told her there was some training going on involving an apprenticeship grant and Immerfall was in attendance. Although she had not been invited, Claimant decided to go to the conference because it sounded like something that would pertain to her employment. She arrived sometime after 2:00 p.m. At some point during a break in the afternoon, Ms. Claimant saw Dave Brown and greeted him. At the end of the day, near 4:30 p.m., Brown drew Claimant aside and expressed his surprise at her presence.

Mr. Brown told Claimant she had not been approved to attend the conference. Claimant insisted she had been told by management she could attend any conference that pertained to her job duties and she did not have to get approval to do so. Claimant then demanded to know how others were selected to attend the conference and threatened that she was going to the director of the agency to complain. Brown reiterated to Claimant that she was not approved to attend the conference, that she should report to the office the following morning instead of returning to the conference, and that they could continue their discussion at the office on Monday (May 16). Claimant continued to question Brown angrily until he said their conversation was over and walked away. As Mr. Brown walked away, Claimant again stated she was going to speak to the director about the matter.

After Brown walked away from the conversation, Claimant left the conference hall. At 4:53 p.m., Claimant telephoned IWD Director Townsend and left a voice message stating that she was being denied training and wanted to bring that to the director's attention.

The following morning, Friday, May 13, 2016, Claimant reported to her office just before 8:00 a.m. She remained there for some time but then left and returned to the conference even though she had been specifically instructed she was not approved to go. She did not go by Brown's office. We do not credit Claimant's claim that she somehow misunderstood that she was not to go.

On Monday, May 16, 2016, Jennifer Reha received notice from Director Townsend's assistant, Diana Sisler, that Sherri Marion had telephoned Director Townsend on May 12th and left the message she was being denied training related to her job.

On May 25, 2016, the Claimant was interviewed during an investigation into her actions surrounding the IowaWorks Integrated Spring Meeting. During the interview, Claimant falsely denied that Brown told her she could not attend the conference the following day. The Claimant also falsely said that she had gone to Brown's office the following morning at 8:00 to discuss the issue with him but he was not in and his office was dark. We do not credit the Claimant's claim that when she made this false statement she had been confused over the days in question. Additionally, the Claimant first stated that Dave Brown was the only person she had discussed attendance at the conference. Only when confronted with evidence of her call to Executive Director Townsend, did the Claimant admit that she "vaguely" remembered telephoning Townsend. (Exh. 4). We do not credit the Claimant's claim that she actually had not remembered making a complaining phone call to the director of IWD, five steps above her in the chain of command.

After the investigation concluded the Claimant was fired for attending the Integrated Spring Conference after being explicitly told by her supervisor that not to attend, for misuse of her state phone, and for lying during the investigation. We find that the Employer would have fired the Claimant for the insubordination alone, and also for the lying alone. We thus do not discuss the misuse of the phone as we find that this was not a "but for" cause of the decision to terminate.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) 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 Employer's evidence concerning Mr. Brown's interactions with the Claimant, specifically that he told her she was not to attend when he saw her at the conference. We also find the Claimant not credible. Specifically we do not believe she was confused over whether she should attend the second day. We find her willfully defiant, not confused. We also do not believe her explanations for the false statements she made to the Employer during its investigation. We note that the Administrative Law Judge, though finding for the Claimant, also found her less credible on the issue of her instruction than the Employer's evidence.

Given our weighing of the evidence, and the facts that we have found, we find that the Employer has proven the Claimant was discharged for misconduct. As we have stated in the findings of fact, the insubordination in disregarding her superior's orders, and the false statements made during the investigation each would be sufficient to cause the discharge. Thus we address each one in turn.

Insubordination: 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). "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." *Myers v. IDJS,* 373 N.W.2d 507, 510 (Iowa 1983)(quoting *Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review,* 19 Cmwlth. 475, 338 A.2d 794, 796 (1975)); *Pierce v. IDJS*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). In general, "[a]n employer has the right to expect an employee to follow his directions…" *Myers* at 510. 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 Claimant'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).

In general, acts of disrespect and defiance of authority may be aggravated if accompanied by confrontational language or behavior. *See Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

At base the Claimant was specifically told not to come to the conference but intentionally chose to ignore this directive. Even if we credit her claim that she did not know, *in general*, about needing prior approval once Mr. Brown told her specifically not to come, it is a different matter. We find that Claimant was specifically told not to come the next day, and that she simply ignored the specific directive. This is exacerbated by her confrontational demeanor with Mr. Brown, and with her decision to by-pass the chain of command. Even disregarding these two factors, though, we still find the intentional and defiant decision to report where she chose rather than where she was ordered was disqualifying insubordination. Her actions were *not* in good faith, and so her reasons are easily outweighed by the Employer's interests in having workers report where they are told to report.

Dishonesty: Even a single instance of covering-up a workplace transgression can itself be misconduct. *White v EAB* 448 N.W.2d 691 (Iowa App. 1989). In *White* a nurse made a charting error, a matter of simple negligence that ordinarily is not misconduct. When she was questioned about it, the employee "denied the situation and provided misinformation." *White* at 692. The Iowa Court of Appeals found substantial evidence to support disqualification based on "claimant's lack of candor when questioned about the incident." *White* at 692. The Court did not address the underlying reasons for the questioning but found that the single instance of "lack of candor" was sufficient to disqualify. We reach a similar conclusion here. Even if we were not to disqualify the Claimant based on the insubordination, we would disqualify her for being untruthful with the Employer. As we have found, she told the Employer three things that were not true: that she was not instructed not to attend, that she went to Brown's office before attending the second day, and that she had only contacted Brown about the issue. The number of the deviations from what actually happened weighs in our decision to discredit the Claimant, as does the implausibility of her claim that she could call in a complaint to the Director of the entire Department and not remember. This intentional dishonesty during the investigation, as in *White,* is an independent

reason to disqualify the Claimant from benefits.

Conclusion: We find the insubordination and dishonesty proven by the Employer each, severally and combined, rise to the level of disqualifying misconduct. The Claimant is thus denied benefits.

DECISION:

The administrative law judge's decision dated January 17, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

_____
Kim D. Schmett

_____
James M. Strohman

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

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.

_____
Ashley R. Koopmans

RRA/fnv