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

JUSTIN C CHASTAIN	:	
	:	**HEARING NUMBER:** 11B-UI-02033
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
THE WINE EXPERIENCE LLC SERIES II	:	
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:

Justin Chastain (Claimant) worked as a full-time deli manager for The Wine Experience LLC Series II (Employer) from September 1, 2006 until he was fired on November 15, 2010. (Tran at p. 2-3; p. 13). When a sales report is run from the Employer's cash register it shows the total sales, the returns, the "void durings," the "void afters" and any payments on account. (Tran at p. 4; p. 23; Ex. 1). A "void during" is reported when the transaction which is when a normal sale transaction is started but it is voided before it can be completed. (Tran at p. 4; p. 23-24).

The Employer started requiring its employees do a sales report when they arrived and also when they left. (Tran at p. 4). When reviewing these reports the Employer noticed that the Claimant had an unusually large number of "void durings." (Tran at p. 4-5). The employees handle cash and the exact

change is often

provided. (Tran at p. 4). The Employer suspected that what was happening was that the sale was voided and the Claimant kept the payment. (Tran at p. 4). The Employer also received reports from Younkers loss prevention that the Claimant was giving away food, and taking food home. (Tran at p. 6; p. 9). After conducting an investigation the Employer terminated the Claimant on November 15, 2010 for the alleged theft of money. (Tran at p. 3; p. 4-6; p. 11; p. 13). While alleged theft of food was a factor in the decision to terminate, the Employer would have terminated over the money alone, but would not have terminated over the food issue alone. (Tran at p. 3; p. 6 [first notice about food issue is June]; p. 9, ll. 29-34; p. 21).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2011) 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 reaching our findings of fact, we have weighed the competing evidence. The Employer did not supply first-hand testimony to refute the Claimant's statement that he did not steal either food or money. The Employer admits its video would show no thefts. The Employer deduces from the existence of many "void durings" results that the Claimant must have been keeping the money when people provided exact change. But, frankly, this is little more than speculation. Moreover, even in the Employer's theory there is inventory going out the door, and no money coming back in. The Employer says that on one given day, the Claimant had 67 voids in 398 transactions, or just about 17% of the time. (Tran at p. 3; p. 8 [50 of 181 or 28%). Ordinarily, we would think that if the Employer had almost 20% of its inventory being stolen, or even a mere fraction of that much, this would show up in the books *somewhere* besides the "void durings." No such evidence was presented. And while the Employer states that it had eyewitness, evidence of the Claimant running the register and voiding sales, no such evidence was presented. There are meanwhile explanations for the high number of "void durings," primarily the way the Claimant ran the register. Also, the Claimant makes a good point that he had no way of knowing that the surveillance camera angle would not show theft. (Tran at p. 16). To steal with cameras right there would be remarkably foolish. Yet, we agree with the Employer that the explanations supplied by the Claimant are not completely satisfying. The Employer has generated some reason to doubt the Claimant's denials. While this doubt may certainly be enough to justify the termination decision in the Employer's mind, it just isn't enough doubt for us to conclude – on this record – that more likely than not the Claimant is a thief. Misconduct has only been shown to be a possibility, not the more likely possibility, and thus misconduct has not been proven.

As for the theft of food, we find no misconduct for two reasons. First, the Claimant would not have been terminated for this alone, and we find he would have been discharged for the alleged theft of money alone. Misconduct, which is not a "but for" cause of the termination, cannot be disqualifying. Second, the evidence shows that the Employer did not give clear directives on what to do with left-overs from employee meals, and thus the Employer has failed to show that the food issues were the result of more than a good faith misunderstanding. (Tran at p. 17; p. 28). Plus, the possibility of earlier purchase, and later consumption, was not accounted for by the Employer. (Tran at p. 18-19; p. 28-29). Misconduct has not proven.

DECISION:

The administrative law judge's decision dated March 30, 2011 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

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Elizabeth L. Seiser

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 Kuester

RRA/kk