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

TONYA L HAMRE Claimant and **HORIZONS UNLIMITED OF PALO ALTO** Employer	:	**HEARING NUMBER:** 18BUI-12558 **EMPLOYMENT APPEAL BOARD DECISION**

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 DENIED

The Employer appealed this case to the Employment Appeal Board. Two 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:

Tonya Hamre (Claimant) worked as a part-time direct support professional for Horizon's Unlimited of Palo Alto (Employer) from March 27, 2014 until she was fired on November 15, 2017.

On August 19, 2015, the Employer issued the Claimant a written warning for attendance. The warning informed the claimant that she should "remain at work the entire shift". Portions of the handbook were written into the warning. The employer notified the Claimant that further infractions could result in "a three day suspension which could lead to termination".

On October 2, 2015, the Employer issued the Claimant a written warning and three-day suspension for attendance. The warning again stated that the claimant must "remain at work the entire shift". The Employer notified the Claimant that if she did "not work her entire shift, or find someone to fill in without management assistance", she would be terminated.

On November 17, 2016, the Employer issued the Claimant a written warning for attendance. The employer notified the Claimant that leaving early without prior supervisor approval would result in termination from employment.

On November 7, 2017, at 5:00 p.m., the Claimant asked her manager if she could leave work at 7:00 p.m. The manager gave the Claimant permission to do so. The Claimant was to be at work in order to help render cares for individuals once they returned to the job site where the Claimant was located. At 6:15 p.m. the Claimant called the workers who were with these individuals and discussed the situation. They decided that it would be unlikely that the individuals would get there by 7:00 p.m. They agreed the Claimant could leave right away. The Claimant left work at 6:16 p.m. without getting approval from a manager. She had been told that same day that she was required to stay until 7:00. The Claimant knew she should have gotten management approval before leaving. The Claimant did not work from November 11 until November 15, 2017. On November 15, 2017, the Employer terminated the Claimant for leaving work without permission.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2018) 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).

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).

We find that the Claimant's decision to leave work when she was told to stay was insubordination. The Claimant gives as her reason for refusing the directive to stay that she had discussed it with a co-worker and they decided she probably would not be needed. This is simply subordinates second guessing management, and is not a substantial reason to disobey an order.

In insubordination cases the Board evaluates the reasonableness of the employer's demand 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). The key to such cases is not the worker's subjective point of view but "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). For example, in *Green v. IDJS,* 299 N.W.2d 651 (Iowa 1980) an employee refused to sign a warning to acknowledge that she understood why she was being warned. The Court found the refusal to be disqualifying as a matter of law, and did not focus on whether the warning was justified or not. *Green* at 655. That wasn't the point in *Green*, just as isn't the point in this case. The point in both situations is that a refusal to do what you are told, so long as no danger or illegal situation is created, "show[s] an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer." 871 IAC 24.32(1)(a). Here the Claimant was told that she must remain at work until 7 p.m. She didn't want to. It matters not whether the Petitioner was right that she likely would not have been needed. She had in the meantime been specifically instructed to stay until 7, and then ignored this. This is defiance. Here that defiance is worsened by the fact that Petitioner was well aware from her prior warnings that she must have permission from a supervisor before leaving early. Since those warnings are fairly remote in time, we do not consider them for the purpose of enhancing the magnitude of the final incident. Here we consider the prior warnings only because they show quite clearly that the Claimant was aware that she was required to get prior management approval before simply taking off early.

The Claimant's defiance is not excused by weighing the reasonableness of the employer's request in light of the circumstances against the Claimant's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In making this weighing, there is little to put on the Claimant's side of the scale. As discussed above, the key to such cases is not the worker's subjective point of view but "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). It is simply no justification to a directive to stay at work that the Petitioner would prefer not to. If she were

missing work for surgery or a funeral or a court date or the like, it

would be a different matter. But we have no evidence of such compelling reasons to ignore a workplace directive. Where there is no issue of safety, or health, or other compelling reason posed by merely staying at work when have been specifically told to, all that is left is defiance. Benefits are denied for insubordination, not excessive absenteeism.

DECISION:

The administrative law judge's decision dated January 4, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was disqualified based on the nature of her separation from the Employer. 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.

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

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv