

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

WILLIE DWEH

Claimant

and

REM IOWA COMMUNITY SVCS INC

Employer

HEARING NUMBER: 18BUI-08409

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer 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:

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following modifications:

The Employer has a policy, i.e., missing person protocol, which provides direct support staff are required to notify a supervisor in the event a client does not return home from an outing within 15 minutes of their scheduled arrival time. (13:43 -13:58) The Claimant received training on this policy. (13:47) Although some clients have an extended return time, this particular client did not. (14:02-14:23)

The condo complex where the client was dropped off was not associated with REM Iowa. (1100-11:15) The client had no understanding that he had been dropped off at the wrong location where he subsequently entered into an unoccupied apartment. (12:12-12:27)

The Claimant was required to call his supervisor at 4:45 p.m. when the client did not return; he did not contact a supervisor, nor the daycare to inquire about the delay. (14:41-14:55)

The Employer had ten staff members assist the police in the search throughout the night for the missing client. (15:53-16:03)

The investigation took approximately three weeks to conclude (19:51-20:24) while the Claimant was on unpaid leave according to the Employer's suspension policy. (20:39-20:50)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

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 attribute more weight to the Employer's version of events.

The record establishes the Employer maintains a procedure to handle a 'missing person', which the Claimant did not dispute. His only argument that the bus company should be held responsible is not wholly without merit, but for the fact the bus driver, obviously, had no knowledge at 4:45 p.m. that the client was considered missing until several hours later. Because this client required 24/7 care, it was incumbent upon the Claimant to follow the protocol on which he was trained when the client did not return. His failure to do so in a timely manner resulted in this disabled individual being left unattended for several hours without any type of support in a strange place. Due to the client's brain injury, he had no understanding of the potential danger he was in, or understanding of how to seek help. The Claimant's failure to act could have resulted in significant liability to the Employer.

Both parties agree the Claimant had no history of any prior warnings for any type of infraction, let alone this type of circumstance. And even though this was an isolated incident, such a singular act may be considered misconduct where the Claimant intentionally failed to act in accordance with a known company policy, which could have grave consequences. Based on the Claimant's previously unblemished record, we can reasonably assume the Claimant knew his job was in jeopardy when he was immediately placed on unpaid suspension for failing to make the 4:45 p.m. call about the missing client. The Claimant knew, or should have known his continued employment depended on the outcome of the investigation. The fact that the investigation took nearly three weeks does not detract from the currentness of the Claimant's final act. The court in *Milligan v. Employment Appeal Board*, 802 N.W.2d 238 (Iowa App. 2011), held that it is reasonable to allow a company time for its human resources department to assess the situation once the Employer learned of the misconduct, and notified the Claimant that his job was in jeopardy pending the outcome of the investigation. That is exactly what happened in the case before us. Based on this record, we conclude the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated August 31, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was disqualified for reasons. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED**.

Kim D. Schmett

Ashley R. Koopmans

AMG/fnv

James M. Strohman