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

JOHN W DUSENBERRY Claimant, and MIDWEST JANITORIAL SERVICE INC Employer.	:	HEARING NUMBER: 08B-UI-07830 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 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:

John Dusenberry (Claimant) worked for Midwest Janitorial Service, Inc. (Employer) as a part-time custodian from March 20, 2002 until the date of his discharge on July 16, 2008. (Tran at p. 2; p. 5; p. 7). The Employer issued the Claimant verbal warnings for failure to follow instructions on June 11 and 20, 2008. (Tran at p. 5; p. 7). The Employer took the Claimant on walk-throughs to explain to him what he needed to do better. (Tran at p. 9; p. 10). The Employer has failed to prove by a preponderance of the evidence that the Claimant received a written warning on July 3. (Tran at p. 8). The Employer failed to prove by a preponderance that the Claimant failed to correct his problems following the verbal warnings. (Tran at p. 8; p. 9; p. 10). Specifically, the Employer failed to prove that the Claimant actually failed to complete his sweeping duties, clean the partition and scrub the garage

floor on July 15 as alleged. (Tran at p. 3; p. 5 [Employer's allegations]; p. 8).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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).

Our findings of fact show how we have resolved the credibility issues in this case. The Employer asserts that the Claimant failed to perform his duties and the Claimant denies it. The Employer alleges

customer complaints but provides no testimony from anyone who actually received the complaints or who was in a

position to verify that the Claimant failed to perform his duties. The Claimant agrees that some complaints were made but we do not have any evidence on the timing, that is, whether they were after the verbal warnings and the Claimant's asserted correction of the problem. (Tran at p. 7). Also the Employer alleges the Claimant received a written warning and the Claimant denies this. (Tran at p. 8). The Employer does not submit the warning into evidence, does not read the warning into the record, nor does it provide testimony from someone who, on the record at least, claims to have actually issued the warning. We do not automatically find that hearsay will be outweighed by live testimony. Walthart v. Board of Directors of Edgewood-Colesburg Community School, 694 N.W.2d 740, 744-45 (Iowa 2005); Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Yet the fact that the Employer chose to rely entirely on hearsay is a significant factor we have taken into consideration when determining if the burden of proof has been carried. The Claimant supplied first-hand testimony and the Employer has not overcome it. True the Claimant states he does not recall the warning, not that he's certain there was none. Still, at best the evidence is equally balanced and, since the Employer has the burden of proof, this means the issues must be resolved against the Employer. The Employer has failed to prove by a preponderance that the Claimant committed misconduct.

DECISION:

The administrative law judge's decision dated September 16, 2008 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. The overpayment entered against Claimant in the amount of $688 is vacated and set aside.

_____
John A. Peno

_____
Elizabeth L. Seiser

RRA/fnv

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.

_____
Monique F. Kuester

RRA/fnv