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

EFRAIN GUTIERREZ	:	
	:	**HEARING NUMBER:** 14B-UI-09377
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
JAMES HOLADAY	:	
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

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:

The Claimant, Efrain Gutierrez, initially worked part-time for James Holaday, (his brother-in-law) (1:03:10-1:03:18) beginning in 1992-1993. (2:04:32-2:04:44) He became a full-time salaried employee in 2007 working as contractor, service representative and advertiser until August 18, 2014. (33:34-35:00; 2:04:54-2:05:29) Efrain constantly talked down to the Employer saying he was too old to run the business, bad-mouthed him to customers, inter alia, and started refusing to work on Saturdays beginning in March of 2014 when the Employer needed him to help with the high volume of work on the weekend. (23:10-23:23; 24:31; 25:12-25:26; 25:13-25:18; 48:12-48:47; 1:10:17-1:10:30; 2:47:44)

Sometime in May of 2014, the Claimant told the secretary, Kelly, that he decided to open up his own satellite installation business because he was unhappy with the way his Employer's business was run. (1:03:57-1:04:13; 2:13:02-2:13:39) The Claimant had already completed an "Application for Service" the previous month (April) (Exhibit1); filled out a Membership Application DISH Network Retailer form as a

'sole proprietor' under the name EZ Media on May 8, 2014 (Exhibit 2); filled out a Dealer Agreement and Statement of Exemption forms dated May 5, 2014 (Exhibit 3, unnumbered pp. 1-2); and filed a Request for Taxpayer Identification Number and Certification dated May 5, 2014 also. (Exhibit 4) Efrain also told Kelly that he intended to continue working for Holaday, collecting a paycheck until he was fired. (1:04:41-1:04:55) The Claimant never signed any agreement not to compete with the Employer.

The Employer saw several Exceed products in the Burlington store, which he questioned the secretary about. (1:56:35; 2:14:35-2:14:48) Finally, on August 1st, Kelly told the Employer that she intended to quit because of the Claimant's and his brother's behavior. (1:05:38-1:06:2) She told the Employer that the Gutierrez brothers had set up a competing installation business (EZ Media) in Burlington using the Employer's computer system and customer base. (28:28-29:30; 39:21; 1:09:39; 1:57:58-1:58:15; 2:23:01-2:23:19; 2:23:32-2:23:52; 2:25:08-2:25:29; 2:25:50-2:27:45; 2:28:17-2:30:15; 2:30:35-2:31:43; 2:32:10-2:33:30; Exhibits 1-5) The brothers installed their system (Exceed) using the Employer's equipment while working on the Employer's clock. (41:03-41:24) On one occasion, the Claimant took information regarding the local vet from Kelly's basket and went over to the vet in a Holladay van during business hours to install the Claimant's own product. The vet had no idea they had purchased the Internet that was not installed by Holladay Satellite. (1:12:53-1:14:08)

The Employer noticed he hadn't received any calls for installation for Direct TV or high-speed Internet for approximately 2 months at the Burlington store. (25:45-26:01; 1:11:27-1:11:33) On August 7th, 2014, the Employer switched the Burlington phones to the Mount Pleasant store phone number and the calls came flooding in for Direct TV and high-speed Internet installations. (26:02-26:35: 1:11:35-1:11:40; 1:40:45) The Claimants had somehow intercepted the Burlington calls. Both Efrain and Danial were very upset that the Employer switched the phone numbers to the point that Efrain stayed late to complain to the Employer that he thought the Employer's action was 'dirty.' (26:42-27:42; 45:35; 1:41:23-1:41:34) Efrain continued to periodically text his displeasure to the Employer several times later than evening.

On Friday, the Employer checked and counted the poles he had in the warehouse, as he also began to suspect that the Efrain and his brother were taking equipment and using it for their side business (20:09-20:33; 22:05-22:10) The next day, August 8th, 2014, the Employer knew he had had 9-10, 2-inch poles. (19:59-20:19; 22:12: 1:55:54) Danial called the Employer the following Wednesday to inform him that he was out of poles. (20:20-20:38) When the Employer asked him what happened to the poles, Danial responded that he didn't know. (21:02-21:09) The Employer believed Danial and/or his brother, Efrain, took the poles and some related equipment because these items were the only things taken, and these were items the Claimant could use in their side business. (20:54; 21:19-21:51) The poles cost between $10-15 apiece. (22:41-22:47)

During the week of August 11th, OSHA came to the Employer's place of business. (1:01:30) The investigator found several violations. (1:01:52-1:02:34; 2:08:34-2:08:49; 2:09:02) The Employer told Danial and Efrain that he no longer needed them, and ended their employment relationship because he believed they stole from him. (19:34-19:54; 1:31:51; 2:06:23; 2:11:34)

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 established escalating circumstances that led to the Claimant's termination. First off, the Claimant refused the Employer requests to work on several Saturdays when the workload demanded it. An Employee's continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). 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). 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 Petitioner'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).

The Employer's request was reasonable in that the Claimant was not required to work every Saturday, only those Saturdays when the installation orders were such that Mr. Holaday was unable to fulfill them alone. There was nothing in good faith about Efrain's refusal to work on Saturdays. His testimony that he didn't receive overtime pay was meritless, as the Employer provided unrefuted testimony that he was a salaried employee. And given the type of business involved, it is not unlikely that many customers would prefer satellite installations on the weekends, which we can reasonably assume the Claimant was well aware. It seems that the Claimant had no problem working on Saturdays in past; the concern came with the onset of the Claimant's start-up of his own business.

Although the Claimant denied that he had a competing business, and that he used Holaday's employment to launch it, the record is replete with evidence to the contrary. (1:03:57-1:04:13; 1:04:41-1:04:55; 2:13:02-2:13:39, Exhibits 1-5) Not only did Efrain complete the necessary paperwork to show he was, in fact, the sole proprietor of EZ Media, he solicited customers from Holaday Satellite, unbeknownst to the customers (the vet), via the Employer's database and trashcan. Any reasonable person would consider his behavior to be a substantial disregard of "…the employer's interests [and] the employee's duties and obligations to the employer…" That, by definition, is misconduct. See also, *Porth v. Iowa Department of Job Service*, 372 N.W.2d 269 (Iowa 1985) wherein the court held that a claimant does his employer no legally cognizable harm by preparing or making arrangement to enter into competition with his employer. However, the court also noted in the alternative that a claimant who, while still employed by his employer, solicits his co-workers to come to work for him in his new business competing with that of his employer could constitute misconduct. Here, Efrain did just that. He solicited his brother, a Holaday Satellite co-worker, to work for him, which he did. Both brothers neglected their employment obligations to Holaday Satellite when they refused for several Saturdays to report to work because they were busy with the side business. If the Claimant believed he committed no wrongdoing against his Employer by running a concurrent, competing business, why did he go through the trouble to deny it? Why wouldn't he have simply stated to Mr. Holaday, "I can't work for you because I'm busy working at my own enterprise?" The fact this never came to light as the excuse is probative that the Claimant had every intention of hiding his business from the Employer, and it doesn't stand too far from reason that the Claimant was also using the Employer's equipment and customer base as well.

Although the Employer eventually suspected the Claimant was using Holaday equipment, i.e., phone, van, computer, etc., he had no proof in the beginning. However, the Employer provided persuasive testimony that in early August of 2014 the Claimant curtailed customer business when the Employer discovered little to no call orders coming in on the Burlington phone; and yet after he redirected that number to the Mount Pleasant number, it was business as usual. It can be reasonably inferred from Efrain's angry reaction that he may have experienced a financial loss as a result of phone number switching; a loss Efrain wouldn't have had if he were working on Holaday's behalf since he was a salaried employee.

Lastly, the straw that broke the camel's back was the missing poles that Holaday had just checked and counted. We find the Claimant's testimony that he didn't know what happened to them to be not credible. It was more probable than not, these missing poles were stolen by the Claimant, his brother, or both of them, who had access, had a business necessity for them, and who by this time had established a competing satellite installation business. And even though the record is void of any prior warnings, this final act upon which the termination was predicated needn't have occurred before and be covered by any warning. Everybody knows that theft is wrong; as all it takes is once instance of theft and the Employer has every right to sever the employment relationship. Based on this record, we conclude that the Employer has satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated October 9, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. 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 Board would also point that because the claimant has received two consecutive agency decisions that allowed benefits, the claimant is now subject to the double affirmance rule.

Iowa Code section 96.6(2) (2007) provides, in pertinent part:

> ...If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision in finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5…

The rule itself specifies:

> Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

In other words, as to the Claimant, even though this decision disqualifies the Claimant from receiving benefits, those benefits already received shall ***not*** result in an overpayment.

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Kim D. Schmett

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Ashley R. Koopmans

RRA/fnv