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

ABDOU RAZAC IBRAHIM

Claimant

and

C/O TALX UCM SVCS INC

Employer

HEARING NUMBER: 17BUI-07959DC

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: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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. Following a remand from the District Court the Board reconsidered the evidence in light of the remand and additional arguments and made its determination without giving weight to the Board's prior determination. The Employment Appeal Board **REVERSES** the decision of the Administrative Law Judge as set forth below.

FINDINGS OF FACT:

Abdou Razac Ibrahim (Claimant) worked for IAC Iowa City, LLC (Employer) from March 21, 2014 through June 29, 2016 as a full-time service employee. (Cert. Rec. at p. 13).

On September 13, 2015, the Employer issued a written verbal warning to the Claimant for taking an unauthorized break when he went out to his car. (Cert. Rec. at p. 15-16; p. 33; Ex. E3, p. 42). The Claimant was thus aware that he was not allowed to take unauthorized breaks by going to his car without permission. (Cert. Rec. at p. 15-16; p. 33; Ex. E3, p. 42). The Employer also warned Mr. Ibrahim that

should he take another unauthorized break, his job would be in jeopardy. (Cert. Rec. at p. 16; p. 32; p. 33; see also p. 20 [Claimant attorney: "we aren't going to contest whether he knew the rules…"]). Although the penalty associated with this warning was reduced following a grievance the warning was valid and remained in place. (Cert. Rec. at p. 33).

The Claimant was scheduled to work overtime on the evenings of June 22nd and June 23rd. (Cert. Rec. at p. 13; p. 15; p. 28). On the 23rd, a couple of employees reported that Mr. Ibrahim was not around on either the 22nd or the 23rd. (Cert. Rec. at p. 13-14; p. 16; p. 21-22). The Employer had no record that the Claimant ever reported to work, which prompted the Employer look for Mr. Ibrahim for approximately two hours on the 23rd. (Cert. Rec. at p. 13-15; p. 17; p. 20-25; Ex. 4, p. 43). When the Claimant could not be found, the Employer observed several hours of video surveillance recordings to determine when the Claimant came in, when he left, and when he returned to the facility on both dates. (Cert. Rec. at p. 17; p. 18-19). The Employer observed Mr. Ibrahim leaving during his shift both nights and not returning until sometime later in the evening. (Cert. Rec. at p. 17; Ex. 4, p. 43 [giving times and length of search]).

On June 24th, Ron Udell (Human Resources Manager) was notified about the prior nights' incidents. (Cert. Rec. at p. 21). The Employer investigated the matter and confronted the Claimant about his whereabouts to which he told the Employer that 'he didn't know'. (Cert. Rec. at p. 17; see also p. 37). The Employer terminated the Claimant for leaving work without prior authorization. (Cert. Rec. at p. 13; p. 34; Ex. E4, p. 33).

REASONING AND CONCLUSIONS OF LAW:

Hearsay:

The Iowa Supreme Court recently upheld an agency decision that relied, in part, on hearsay. In its discussion the Court explained the general principle:

> Under Iowa Code section 17A.14,
>
> > [a] finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.
>
> Iowa Code § 17A.14(1). Under this provision, hearsay evidence is admissible.

Simon Seeding & Sod v. Dubuque Human Rights Commission, No. 16–1014 (May 19, 2017). It is clear that hearsay is not to be excluded merely because it is hearsay. But this does not mean all hearsay is admissible. Like *any other category of evidence* hearsay must rise to the level of trustworthiness set out in the Code section quoted in *Simon Seeding.*

Thus in the case of *Cataldo v. Employment Appeal Board*, 1999 WL 956509 (Iowa App. 1999) the Court of Appeals discussed its own decision in *Schmitz v. Iowa Department of Human Services*, 461 N.W.2d 603, 606 (Iowa App. 1990). In *Cataldo* the employer was the Department of Education and Mr. Cataldo was an unemployment claimant. In that case the employer "relied on hearsay evidence from its investigation

supporting its claim that Cataldo made harassing phone calls and thus engaged in misconduct disqualifying him from receiving unemployment benefits. The department [of Education] did not introduce the interview notes or an alleged letter by an income maintenance worker." *Id. at* *1. The *Cataldo* Court affirmed the finding of misconduct, and made clear that a record comprised solely of hearsay can outweigh live testimony, and that *Schmitz* was limited to the question of meeting the standards of admissibility under §17A.14. In the *Schmitz* case itself the Court discussed evaluating the evidence under the standards of Iowa Code §17A.14(1) which provides the standard of admissibility. Thus in subsequent cases the Courts have found objections to hearsay under *Schmitz* can be waived, as is the case with admissibility and not with substantial evidence challenges. *E.g. Jordan v. EAB,* No. 13-1380, slip op. at 12 (Iowa App. 10/29/2014) (citing *Christiansen v. Iowa Bd. of Educ. Exam'rs,* 831 N.W.2d 179, 192 (Iowa 2013)); *Halter v. IBME,* No. 5-2080 (Iowa App. 4/28/2005)("even if the Board had erred in relying on [hearsay], that error was waived by Halter's introduction of the [hearsay]").

To the extent that *Schmitz* was concerned with the "substantial evidence" test rather than admissibility of evidence, its efficacy is complicated by subsequent statutory changes. At the time when *Schmitz* was decided there was no statutory gloss on substantial evidence. In 1998 such a gloss was added: " 'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code §17A.19(10)(f)(1). Following this amendment it is clear that §17A.19(10)(f)(1) governs the substantial evidence test on appeal to court, and 17A.14 governs admissibility before the agency. Of course, errors in determining admissibility may constitute legal error and would be basis for reversal under Iowa Code §17A.19(10)(b).

Subsequent to *Schmitz* the Iowa Supreme Court gave guidance on *weighing* hearsay in a case where Court review was nearly *de novo*. In *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005) the Court heard a teacher termination appeal. In such cases review is based on a preponderance of the evidence, and the Court *may* make its own credibility determinations. Thus the *Walthart* court discussed how much weight to give hearsay in the first instance. In its discussion the court does not mention *Schmitz* but rather gives general guidance: "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walthart* at 744-45.

The upshot of this for our purposes is that *Schmitz* and 17A.14 now pertain to the threshold of admissibility, whereas *Walthart*'s guidance is useful in weighing any admissible hearsay. The "substantial evidence" test, as now statutorily defined by 17A.1(10)(f)(1) governs judicial review, but that is not our function. We decide what is admissible, then what is credible, and then decide whether the admissible and credible evidence supports a conclusion that the burden of proof has been carried. On judicial review it is the Court that applies the substantial evidence test to our findings. We do not apply "substantial evidence" in making findings but rather make a particular finding of fact only if that finding is supported by a *preponderance* of the credible evidence.

We did not previously discuss admissibility of the hearsay under *Schmitz* because in our view no objection had been raised as required. *See Christiansen v. Iowa Board of Educational Examiners*, 831 N.W.2d 179, 192 (Iowa 2013) (failure to object to hearsay waived issue on appeal); *Jordan v. EAB*, No. 13-1380, slip op. at 12 (Iowa App. 10/29/2014) ("where no objection to the hearsay evidence was made before the ALJ, the objection to the evidence is waived.") The District Court, apparently, has found that error was preserved on this point and remands the case to us to discuss the evidence as contemplated by *Schmitz*. We thus now turn to the question of *admissibility* of the hearsay.

Admissibility Under Schmitz Factors: The *Schmitz* case set out factors to guide a common sense evaluation of whether the evidence is the sort which a reasonably prudent person in accustomed to relying in conducting serious affairs. These factors are: (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. "None of these criteria, however, should be dispositive, and in each case these criteria must be given appropriate weight." *Schmitz* at 608. The approach in *Schmitz* "should in no way restrict the introduction of hearsay evidence in administrative proceedings. It continues to be reversible error for a tribunal to refuse to admit evidence allowed by statute." *Schmitz* at 608.

Despite listing the five factors the *Schmitz* court does little to apply them by name. Several of those factors may not be easily transferrable to the unemployment setting. *Schmitz* dealt with an action brought by the Iowa Department of Human Services alleging an overpayment of benefits. The issue was whether Ms. Schmitz had been living with a man whose presence in the household would reduce the benefits payable. At the hearing on the matter the *governmental agency* appeared as prosecutor. It offered no statements, and no live evidence but instead "read into evidence its investigation and findings." *Schmitz* at 604. The *Schmitz* factors are clearly geared toward deciding whether a reasonably prudent person in the place of the DHS would have used different evidence; thus the concern with cost, availability, and the importance of the policy to be fulfilled. When deciding what evidence to *present* a reasonably prudent prosecuting agency might very well be expected to weigh cost and availability against the policy and the need for precision. Yet these factors have little to do with the *credibility of the evidence* and thus are not geared toward *weighing* the evidence in the first instance. For example, if proffered evidence is not credible in itself we would not think it becomes *more* credible just because no other evidence is available. Similarly, incredible hearsay does not become *more* believable if the policy is unimportant or the cost of acquiring other evidence is high. However, as *Schmitz* suggests, a reasonably prudent person might well be expected to at least *look at* such evidence precisely because it is not worth the trouble to get better evidence, or because no better evidence is available. To be clear, though, this would only bear on whether the evidence is admissible, not necessarily on whether it is convincing.

In applying *Schmitz* in the unemployment context we should recognize the practicalities involved. These include that a reasonably prudent employer, or claimant, proffering hearsay at an unemployment hearing does not make the same calculation as a prosecuting agency. Neither of these private individuals care what the "policy to be fulfilled" in the abstract is, nor are they concerned with the *government's* costs. A rational employer will weigh its exposure, usually a possibility of a tax increase, against the trouble of getting better evidence. This points up flaws in the approach urged by the Claimant. He seeks to weigh this particular employer's assumed costs against the policy of every unemployment claimant in the state. The Claimant's approach

would nearly always result in the exclusion of employer proffered evidence in unemployment

cases. This result has already been rejected by the courts even post-*Schmitz*. *E.g. Cataldo v. Employment Appeal Board*, 1999 WL 956509 (Iowa App. 1999) (affirming denial of UI based on hearsay evidence from employer after discussing *Schmitz*); *Grover v. Employment Appeal Board*, No. 06-2081 (Iowa App. 6/27/2007)(same). The *Schmitz* factors must be tailored to the type of case involved, including that the evidence in question is not being offered by the agency responsible for administering the law. And factors or not our focus is always whether the proffered evidence is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs…" Iowa Code §17A.14(1). In this calculus it is a given that at stake is "serious affairs."

As far as the nature of the hearsay, in general terms, the Employer's witness was a human resource manager. It is, of course, extremely common that an employer presents its evidence of alleged misconduct through its human resource staff. Appearing at such hearings is a routine job requirement for such persons, and thus it is routine to find them presenting the employer's evidence at hearing even though they were not personally involved in the events leading to the job separation. This being such a common business practice is relevant to whether a reasonably prudent employer is "accustomed to relying" on such hearsay in conducting serious affairs. *See Ames Comm. School Dist. v. Cullinan*, 745 N.W.2d 487, 494 (2008)(teacher termination case citing as indicia of reliability "administrative reports and memoranda, while hearsay, had been drafted as part of the school administrators' official responsibilities").

As far as precision, the factual issue here is simple: did the Claimant leave the building without authorization or did he remain throughout his shift. The Claimant testified "I didn't go anywhere…I was in the facility." (Cert. Rec. at p. 30). The Employer's evidence was to the contrary. This is not a case where the employer seeks to characterize the words or behavior of the Claimant beyond the very basic observation that he left the building. It is not asserted that he said or did anything vulgar, rude, or disrespectful. It is not asserted that he violated safety procedures, or did anything wrong but physically leave the plant without permission. The Claimant admits he didn't have permission to leave, but denies he left. (Cert. Rec. at p. 31). Thus there is not a lot of subtlety of behavior at issue. Did he stay or did he go? That is the issue. Thus the "need for precision" is a less than in most cases, certainly less than it was in *Cataldo* or *Grover.*

The "policy to be fulfilled" to the extent that that is relevant where a private party proffers the hearsay, it is also the same as in *Cataldo, Grover* and *Christansen v. EAB,* No. 2-469/11-1715 (Iowa App. 10/3/2012) – all cases where hearsay was relied upon to find misconduct in an unemployment case. The policy in unemployment cases is the policy of making sure that benefit determinations are accurately made, and that charges and the resulting tax are properly levied. In unemployment matters speed of the determination is also very important, at least where the benefit year in question is still pending. *E.g.* 20 C.F.R. §650.4(b) (federal requirement that "at least 60 percent of all first level benefit appeal decisions [be made] within 30 days of the date of appeal"). We find that the overall policy to be fulfilled, even considered in the abstract, does not weigh heavily against using the testimony of human resource personnel about the results of their investigations.

As far as the cost and availability of better evidence not much is known. Normally the party objecting to facially admissible evidence would be expected to lay the foundation for the objection, particularly where that party appeared through an attorney and the other party did not.

The Claimant's attorney did very little to develop the issue of cost and availability. Setting this failure aside, we assume that the 16 hours of video was available and the searchers remained available to the Employer. (Cert. Rec. at p. 14). On the video

question the entire 16 hours would not be particularly relevant. The Claimant asserts that he never left the plant. The Employer's witness testified he saw the Claimant leave the plant based on his review of video. The Claimant seems to complain that the witnesses did not provide evidence about the video that did *not* show him leaving. This is not dispositive.

Let us assume the Claimant never left during his shift then what would the video show? It would not show him leaving during his shift. Let us assume the Claimant left the plant for two hours and then returned then what would the video show? It would show the Claimant walking through the door on the way out, and then walking through the door on the way back. The remainder of the video would show him in the plant. We would not learn anything from hours of video of the Claimant being at the place where *everyone agrees* he was at. There is no issue that during much of his shift the Claimant was at his station. The issue is that one party says he left the building and did not return for an extended time, and the other party denies this. Evidence that he was seen leaving on video, and then seen returning on video is not contradicted by evidence that before leaving he had not left, and that after returning he was back. Thus the burden of viewing all 16 hours of the video was not justified by any probative value it would have. We do recognize that the video of the leaving and returning would, *presumably*, have been a more manageable burden and would be probative of relevant facts.

The testimony on the results of the search would have required multiple witnesses who would have to be called to testify that they were directed to search, that they did search, and then tell us what they found. This would have been a significant burden on the process. Even obtaining statements, which would also be hearsay, would place a significant burden on the Employer where the Claimant had not explained his whereabouts when asked by the Employer, and the Claimant had chosen not to grieve the termination. An employer in such a case would not normally anticipate that it was necessary to collect *cotemporaneous* statements. (The *Board*, of course, gives the failure to grieve no role in its deliberations). After the fact written statements that "I searched, I didn't find anything" are not a significant improvement on the HR staff testimony that the search was conducted and the Claimant wasn't found. Thus the increase in probative value from hearsay statements about the search would have been small.

Considering these factors we come to the ultimate issue of whether the hearsay on the video, the contents of the termination letter, and the testimonial summary of the search, was the sort of evidence a reasonably prudent person is accustomed to relying on in conducting their serious affairs. We conclude that it is. First, the balance of the factors we have discussed leads us to conclude that the evidence was of this sort. Second, the results of an investigation by human resource staff are used by employers on a daily basis to make important employment decisions. *See Cataldo v. Employment Appeal Board,* 1999 WL 956509 (Iowa App. 1999); *Ames Comm. School Dist. v. Cullinan*, 745 N.W.2d 487, 494 (2008). This is also true of the termination letter[1]. This is exactly the sort of evidence that reasonably prudent people are accustomed to rely on in conducting serious affairs. Third, the Employer provided non-hearsay testimony that the Claimant was asked where he had been and he stated "that he didn't know. (Cert. Rec. at p.17); Iowa R. Evid. 5.801(d)(2) (statement of party not hearsay). This statement undermines the claim that the Claimant was never gone. Had he never left he could say where he was and would normally be expected just to say so when asked by Udell. But the response he gave is consistent

[1] We note that a termination letter would very often fall within the business records exception although due to the lack of a contemporaneous objection from the Claimant the Employer had no opportunity to lay the required foundation.

with someone who was trying to conceal where he was. While the Claimant argues that maybe he misunderstood the question this is belied by his testimony: "'he just told me that he, uh, he heard people saying that I was missing, uh, the, the previous day and he wanted to know if it was true or not…I told him 'No, I was here.'" (Cert. Rec. at p. 37). This is not

a failure to understand the question, but contradiction of Udell over what the Claimant actually responded. We credit the evidence that the Claimant responded as described by the Employer. This nonhearsay corroborates the hearsay.

For these reasons we conclude that the proffered hearsay meets the standard of reliability as set out in *Schmitz* and Iowa Code §17A.14(1).

Weight of Evidence:

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). 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 considering the applicable factors listed above, and the Board's collective common sense and experience. We have found the evidence of the Employer more credible than the Claimant's denials.

As far as the video evidence we are not swayed by arguments over the number of cameras being unknown, the failure to review every angle etc. The Employer's evidence is that Mr. Udell saw the Claimant leaving on video during his shift, and then returning later. We know the Claimant cannot be two places at once, and so once he went outside he was no longer inside and once he was inside he was no longer outside. Thus video that he came and left contrary to his testimony is probative without knowing how many cameras there were, and without viewing video of his presence before he left and after he returned.

Similarly, we are not basing today's decision in any way on the *initial* reports that the Claimant was missing, but rather on the testimony about the results of the ensuing investigation. Not knowing the names of those whose information triggered the investigation does not undermine the results of the investigation. In concluding that the Claimant had indeed left the building without authorization we do not consider the initial reports from unnamed persons. (Cert. Rec. at p. 22). As for the search we, again, are dealing with the Human Resource personnel who, in the

normal course of business, would be normally be informed and aware of such operations. The search results and the description of the video evidence are consistent. Also they are corroborated by the non-hearsay testimony that the Claimant was unable or unwilling to account for his whereabouts when asked. Against this we have the Claimant's denial. We do appreciate the

Claimant's current attorney's point that the questioning of the Claimant by his former attorney was not ideal. Also the use of the interpreter can sometimes make testimony seem to lack fluidity. We are well experienced in reviewing hearings conducted with an interpreter and well know how to make allowances for that fact. We have done so here, as usual. We note it is the Claimant's former attorney who had a tendency not to wait for the interpreter. (*E.g.* Cert. Rec. at p. 23-24; p. 28-29). He also had a tendency to argue with the witness and to lead his own witness. (Cert. Rec. at p. 13-15; p. 29; p. 30). We do not fault the *Claimant* for these aspects of the record, and have made appropriate allowances when assessing his testimony. Working with what we have we still find that the Claimant's denials are not convincing as against the Employer's evidence.

We note that the hearing was not in person, and the Administrative Law Judge made no mention of demeanor of particular witnesses when drawing his conclusions on whom to believe. We listened to the recording of the hearing and have the same access to tone of voice, etc. as the Administrative Law Judge. These factors lesson the weight we give the Administrative Law Judge's opinion on credibility.

Adverse Inference: The remand in this case made no mention of the Board taking up the question of an adverse inference under *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976). We are to analyze the hearsay under *Schmitz* and take appropriate action based on our conclusions. We do not think we have authority to draw an adverse inference under *Crosser* on this remand. This is especially the case where the Claimant at no point prior to the district court ever mentioned an adverse inference or the *Crosser* case. The district court certainly did not find that the Claimant preserved error on that issue, indeed the decision does not mention adverse inference except to describe the EAB's position denying any error. We thus do not have authority on remand to rule on the question.

For the sake of efficiency we find that even if we considered the issue the Claimant has fallen short of proving the grounds for the inference. "[C]aution in allowing [the inference] is suggested with increasing frequency." *Crosser* at 685; *Prestype Inc. v. Carr,* 248 N.W.2d 111, 120 (Iowa 1976). The Claimant has failed to show that there is more than a mere possibility that the unproduced evidence is adverse. Also, the Claimant, who was represented by counsel, "had equal access to the witnesses through discovery and subpoenas. He could have called them. He could have offered files from his employer." Cataldo at *4. Further the Employer volunteered a witness and the parties seemed to have let this slide without further exploration. The fact of this offer, however, tends to undermine the inference that the Employer was hiding something.

Misconduct:

Iowa Code Section 96.5(2)(a) (2017) 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).

The Claimant was required to remain in the facility while he was scheduled to work. He had been warned about leaving without permission, and then he disappeared while at work without notice to the Employer about where he had gone. The Claimant gives us no explanation for his disappearance but instead denies that it took place – a denial we do not credit. The Claimant's defiance of his warning not to leave the building without permission cannot be excused by measuring 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). This is because the Claimant makes no excuse, and through his attorney acknowledged that he was aware of the rules. The Claimant gives no reason for his disappearance, and no reason for his decision to ignore the warning that such disappearances could result in termination. The Employer naturally expects its workers to stay on the job and not disappear. The Claimant had been warned and disciplined over this very thing. Even though the Employer agreed to reduce the past discipline the Claimant was still disciplined and specifically instructed that leaving without authorization again would result in termination. There being no justification for the disappearances, we are left with is a warning, a perfectly reasonable instruction, and repeated defiance of the warning, instruction and known rules. This is misconduct.

To be clear, we use the warning not as the "current act" of misconduct but for the fact that the Claimant was aware how serious it was to leave the job site like he did. As explained by the Iowa Court of Appeals:

> The purpose of the rule mandating that the termination must be based on a current act is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. *See Infante v. Iowa Dep't of Job Serv*., 364 N.W.2d 262, 266 (Iowa Ct. App. 1984). In this case, an independent and current basis for termination existed. The IWD referenced the prior instances simply to prove this incident was not an isolated instance of poor judgment, as required by the rule. *See* Iowa Admin. Code r. 871-24.32(1)(a) ("While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts."). The record is clear that the ALJ used Christiansen's past acts to consider the magnitude of the current act of misconduct, but that Christiansen was terminated for a current act of misconduct—the incident involving M.K.

Christiansen v. EAB, No. 11-1715, slip op. at 21 (Iowa App. 10/3/2012). The prior warning here is thus used only as in *Christiansen*, to show that the Claimant's actions during his final days were not isolated but were in willful disregard of known rules.

DECISION:

The administrative law judge's decision dated August 16, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, the Claimant 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".

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv