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

ANDREW KRUSE Claimant, and CHARLOTTE ELECTRICAL SERVICE INC Employer.	:	HEARING NUMBER: 09B-UI-03755 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:

Andrew Kruse (Claimant) worked as a journeyman apprentice for Charlotte Electrical Service, Inc. (Employer) from December 24, 2007 through the date of his discharge on February 4, 2009. (Tran at p. 2; p. 14 [letter was day of termination]; p. 18; Ex. 2 [letter dated February 4]). Throughout his employ the Claimant was unable to perform the level of proficiency desired by the Employer. (Tran at p. 3; p. 4; Ex. 1; Ex. 2). The Employer believed that the Claimant's job performance was marked by errors, forgetfulness, and slowness. (Tran at p. 4-8; p. 10-12; p. 20; p. 21; p. 22; Ex. 1). The Claimant was afraid to work above ground level. (Tran at p. 5; p. 21; Ex. 1). On February 4, 2009 after thinking about the issue the Employer decided to terminate the Claimant for these performance problems. (Tran

at p. 13-14; Ex. 1; Ex. 2).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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).

In consonance with this, the law provides:

> *Past acts of misconduct.* While past acts and warning 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 termination of employment must be based on a current act.

871 IAC 24.32(8); accord Lee v. Employment Appeal Bd. 616 N.W.2d 661, 665 (Iowa,2000); Ringland Johnson, Inc. v. EAB, 585 N.W.2d 269, 271 (Iowa 1998); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 507, 510 (Iowa App. 1985). This provision means that even termination for acts of misconduct are not disqualifying if the acts are not "current acts" of misconduct.

Thus even when we find that allegations made by an employer would establish misconduct there remains whether the alleged acts were current in terms of the discharge. In determining whether a discharge is for a current act we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination, or at least of notice to the employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the Employer. Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given). In the past a different majority of this Board has held that if an Employer acts as soon as it reasonably could have found out about the infraction under the circumstances then the action is for a current act. The majority members in this case are not in total agreement on the standard for determining if an act was "current". We do agree, however, that even under the standard that is more favorable to employers the Employer has failed to establish a current act in the context of this particular case.

No Final Act: Just why the Employer decided to discharge the Claimant on the day that it did is not shown. We do understand that the Employer had been dissatisfied for a while. But what final act triggered the decision to discharge is not established by a preponderance. (Tran at p. 2-3). The Employer identifies actions (or inactions) by the Claimant on January 15 that are very similar to what he had done before. (Tran at p. 9; Ex. 1). Moving show, lack of motivation, doing a "better job" were all long-term problems. Even clocking out early had been a problem in the past – with no warning that his job was in jeopardy. (Tran at p. 20; p. 25). None of this establishes any more than ongoing performance issues with the Claimant. Certainly no specific precipitating cause of the termination is shown.

Even looking at the 15th as somehow significant the discharge did not occur until eighteen (or twenty depending on what date you use) days later. The Employer has failed to prove any conduct occurring in the final two weeks of the Claimant's employ that constitutes misconduct. No legally sufficient reason for the delay in the termination has been established. No final act of misconduct has been proved, and the only acts that have been proved as possibly being misconduct were not current acts. Under this state of affairs the Claimant is not disqualified.

Poor Performance Not Disqualifying: Even overlooking the current act issue the Employer has not shown misconduct by the Claimant. As the Employer put it there were "problems… with Andy and his performance." (Ex. 1). The challenge for the Employer is that when an allegation of misconduct is based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). "[M]ere negligence is not enough to constitute misconduct." Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000). A simple incapacity is not misconduct. Newman v. IDJS, 351 N.W2d 806 (Iowa 1984); Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991).

In this case, we do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." Lee v. Employment Appeal Board, 616 NW2d 661, 668 (Iowa 2000). As far as we know he never demonstrated satisfactory competence and, based on this record, we cannot infer that this was intentional rather than inability. (Tran at p. 25 [best effort]). The Claimant is therefore not disqualified from benefits based on the performance problems. While the Employer may have compelling business reasons to terminate the Claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). As an alternative to our ruling that the Employer failed to prove a final current act precipitating the discharge, we also hold that the Employer failed to prove that the Claimant's discharge was due to something other than non-disqualifying poor performance.

DECISION:

The administrative law judge's decision dated April 30, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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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.

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Monique F. Kuester

RRA/fnv