

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

JOSE L GOMEZ

Claimant,

and

SWIFT & COMPANY

Employer.

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HEARING NUMBER: 09B-UI-11773

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 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:

Jose Gomez (Claimant) was employed as a full-time production worker by Swift (Employer) from December 29, 2008 until the date of his discharge on June 17, 2009. (Tran at p. 3-4; p. 7; p. 12). He was discharged for the stated reason of damaging company property. (Tran at p. 4-5).

On June 17, the Claimant was running a saw when he was slightly injured. (Tran at p. 8; p. 12). This caused him to let go of the saw while it was running and this in turn caused damage to the Employer's equipment. (Tran at p. 6; p. 8; p. 9; p. 10; p. 12; p. 15).

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:

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).

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). Carelessness may be considered misconduct when an employee commits repeated instances of ordinary carelessness. Where the employee has been repeatedly warned

about the

careless behavior, but continues with the same careless behavior, the repetition of the careless behavior constitutes misconduct. See Greene v. Employment Appeal Board, 426 N.W.2d 659, 661-662 (Iowa App. 1988). “[M]ere negligence is not enough to constitute misconduct.” Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000).

The evidence of the Employer, as far as the alleged admission by the Claimant was concerned, was based on statements of witnesses repeated by Mr. Luse. The Claimant’s own admission would not be hearsay. But the testimony that the Claimant had made the admission was merely repeating what someone else said the Claimant said. This is hearsay. We do not automatically find that hearsay will be outweighed by live testimony; but when the record, in support of a party is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). “[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 v. Board of Directors of Edgewood-Colesburg Community School, 694 N.W.2d 740, 744-45 (Iowa 2005). 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 have found credible the Claimant’s testimony in large part because he was the only witness with first-hand knowledge of critical issues in the case.

The Claimant did not speak English as his primary language. The supposed admission was made to an interpreter. All we know about the interpreter is that she spoke Spanish as her native tongue. The fact is, most interpreters are native speakers of *one* of the languages involved. There is a lot more to being an interpreter than that. For example, it would be nice to know how well the interpreter knew English. We cannot conclude that the Claimant admitted to throwing the saw based on what an absent witness reports was told her by an absent translator, whose qualifications remain mostly unknown. The Employer had the burden of proof and simply failed to overcome the Claimant’s credible testimony that he did not throw the saw. Misconduct is not proved.

DECISION:

The administrative law judge’s decision dated September 16, 2009 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. 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.

John A. Peno

Elizabeth L. Seiser

kjo

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 Kuester

RRA/kjo