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

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| **CONNIE K ROOT**<br><br>Claimant<br><br>and<br><br>**MCKENZIE CHECK ADVANCE OF IA LLC**<br><br>Employer | : | **HEARING NUMBER:** 15B-UI-10932<br><br>**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, 96.3-7

**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. 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:**

Connie Root (Claimant) worked for McKenzie Check Advance (Employer) as a full-time center sales manager from April 21, 2008 until she was fired on August 28, 2015.

As the center sales manager for the Employer, Claimant was responsible for the management of her location. Claimant had several years closing without violation.

The Employer is a short term lender. When a customer receives a loan from the Employer that customer writes a personal check, for the amount that is owed, which the Employer then holds as collateral against the loan. The Employer is governed by state law and it also has company polices. The Employer has a company policy that provides for a past due limit of fourteen days. Ex. 1. Iowa state law prohibits the Employer from providing loans for longer than thirty-one days. Ex. 1; Iowa Code 533D.10(1)(c). The Employer's past due deposit report shows the accounts that are past due and also any accounts that would

be in violation of the state law. Claimant normally runs a past due deposit report when she starts the day. The Employer's system does not generate an automatic warning on checks held to long because the concern is Iowa specific and Iowa only has 35 of the Employer's over 2000 stores. The Claimant believed that the system would generate such a warning.

On August 18, 2015, the Claimant failed to process a check on an account on a loan that had become thirty-two days past the date of origin. She was fired ten days later.

Claimant had two prior written warnings for performance/work quality. Ex.1. Both warnings were because on two separate occasions Claimant was charged with a cash shortage on her drawer. (Ex. 1). After the second violation the Claimant was required to use a "currency count log" when balancing the drawer to avoid future problems. The Claimant did so and experienced no further cash drawer issues. The Employer has a progressive disciplinary policy that provides for a verbal warning, then a written warning, next a final written warning, and finally termination. Ms. Lander testified Claimant had a prior verbal warning. The Employer considered all the Claimant's prior warnings to be for poor performance. The Employer fired the Claimant not based on her history but because it considered a single violation of state law to be an immediate termination offense.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2015) 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.

This provision means that even termination for acts of misconduct are not disqualifying if the acts are not "current acts" of misconduct. This does not mean the prior performance problems are irrelevant but that the only proper use of a claimant's previous performance issues is as background for assessing the seriousness of the final act. In other words, the prior acts could operate as a contributing cause to the termination – by enhancing the seriousness of the final act. But those prior acts do not convert a mistake into a willful act of misconduct and they cannot themselves constitute disqualifying misconduct. As explained by the Iowa Court of Appeals, even though past acts can be used to enhance seriousness, "this course of conduct must be sufficient to manifest an intentional and substantial disregard for the employer's interests." *Budding v. Iowa Dept. of Job Service*, 337 N.W.2d 219, 223 (Iowa App. 1983).

This case turns on the final violation of the Claimant. Even though she was previously warned over some performance issues, we do not give that much weight in our analysis. First, the Claimant had a clean seven-year record, and then some performance issues. One of these (the verbal warning) is unidentified and thus of no weight at all. The $80 error was not proven to be an error actually attributable to anything the Claimant did rather than a computer error outside her control. The other cash shortage error is of the type that a change in procedure by the Claimant seems to have solved. It is an example of "ordinary negligence" at the worst. Further, its nature is quite a bit different than the final incident that got the Claimant fired. Second, and fundamentally, there is no causal link between these earlier issues and the termination. The Employer is clear that the Claimant's holding of the check past 31 days is a "one and done" violation. Regardless of the discipline history of the Claimant, she was getting fired. Thus we, like the Employer, focus on that final incident.

According to the Claimant, whom we find credible, the check that was held past the 14 days was not one that the Claimant was directly responsible for. There is no such thing as vicarious misconduct, and thus we do not charge that violation to the Claimant in our analysis. In the final violation the Claimant overlooked on a single day that she was holding a check past the 31 days. The Claimant had been successful in tracking this issue in the past but the Employer had changed her process. Under the new system the Claimant believed she was to rely on checks being flagged by the computer. On August 18 the Claimant

did not see the check being flagged by the computer as she believed should occur if there was a problem. She thus was not actually aware of the problem. As far as the Claimant knew, she was in compliance. This is not an intentional disregard of procedure but an oversight or a misunderstanding. Based on the particular circumstances of this case, especially the lack of any proof of prior discipline for anything similar over the Claimant's seven years of employment, we cannot find that this was more than an isolated instance of unsatisfactory conduct that will not disqualify the Claimant from benefits. 871 IAC 24.32(1)(a).

The Board understands that the policy on the maximum period for holding the checks is important, and that state law is involved. This is often the case. It is common for alleged misconduct to involve regulatory or statutory proscriptions. For example, drivers of commercial vehicles have specific requirements on the time and manner of driving imposed on them by law. 49 CFR 383. This does not mean drivers who are engage in ordinary negligence, in violation of the rules of the road, commit misconduct. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000); *Fairfield Toyota, Inc. v. Bruegge*, 449 N.W.2d 395 (Iowa App. 1989). Food service workers must handle food, dress, use the restroom, etc. as prescribed the Food Safety Code. Iowa Code §137F.2 (adopting 1997 food code for all Iowa food establishments). This does not mean a food service worker who forgets to wear a hairnet commits misconduct just because it is a violation of a regulation. Nurses must administer medications according to the licensing standards of their profession and of whatever facility they may be working in. 655 Iowa Admin. Code 4.6 (nursing standards); 481 IAC 58 (skilled nursing facility); 481 IAC 57 (residential care facility); 481 IAC 51.7(hospital). This does not make poor judgment in rendering care, in violation of governing regulations, into misconduct. *Infante v. Iowa Dept. of Job Service*, 364 N.W.2d 262, 265 (Iowa App. 1984). Construction and manufacturing workers are expected to comply with very important OSHA safety regulations yet their violation of those standards does not automatically mean they are disqualified. The point is that many employees may engage in isolated acts of negligence, unsatisfactory conduct, or poor judgment that violates some rule or regulation. This fact alone does not convert isolated conduct into misconduct. The key is the nature of the conduct alleged to be disqualifying – not just the importance of the policy at issue. In other words, "[m]isconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.* 616 N.W.2d 661, 665 (Iowa 2000); *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct.App.1995); *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *Breithaupt v. Employment Appeal Bd.*, 453 N.W.2d 532, 535 (Iowa Ct.App.1990); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219, 222 (Iowa App. 1983). Thus, in any case, the issue is not the importance of the policy the Claimant violated. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed disqualifying misconduct. We conclude that it has not and benefits are therefore allowed.

In addition, there is the question of the Employer's 9-day delay in the case. The law limits disqualification to current acts of misconduct. 871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). The Employer discovered the error on August 19. It then took no steps whatsoever until August 28. The Board does not need to address in this case what exactly is the standard for determining if an act is "current". This is because 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. Baring exceptional circumstances, an Employer is allowed a delay in terminating so that it may conduct an investigation, draw a conclusion, and make necessary assessment of the seriousness of the infraction. Here the Employer had nothing to investigate, and nothing to assess. The Employer is insistent that the error of August 18 is easily verifiable and termination automatic. What, then, took so long? The Employer states only that the divisional director of operation was on vacation and unable to travel. Such reasons can excuse

a delay, but has done so only where a Claimant is on notice that a discipline is at least a possibility such as occurred in *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988). Even knowledge that an investigation of a serious issue is pending can provide sufficient notice. *See Milligan v. EAB, 10-2098,* (Iowa App. June 15, 2011). But so far as we can tell from this record the Claimant was given no notice at all that an issue was pending. Under the particular circumstances of this case we find that the termination was not for a current act, and under this completely independent reason alone we also allow benefits.

Finally, solely for the edification of the parties, we point out that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. In particular our ruling today does not take into account allegations of discrimination and we express no opinion whatsoever on the issue, and even if we did that would have no effect outside the context of this case.

**DECISION:**

The administrative law judge's decision dated October 19, 2015 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 $1,149 is vacated and set aside.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv