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

BONNY M ERDAHL	:	
Claimant,	:	**HEARING NUMBER:** 09B-UI-00444
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
IOC SERVICES LLC	:	
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 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:

The findings of fact made by the Administrative Law Judge are adopted by the Board as its own with the following modifications:

The last sentence of the second paragraph of the findings of fact is struck and the following inserted in lieu thereof:

> The Claimant did not understand that she had an option to accept a demotion rather than perform her then current job. (Tran at p. 27; p. 28-29). The Claimant recalled talk about a demotion but apparently understood this as being a possible result of her continued struggles. (Tran at p. 28-

29). The Claimant did try to complete the offered training but found that she could not do so and also complete all her job duties. (Tran at p. 14-16; p. 19-20; p. 21).

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).

We are able to agree with the Administrative Law Judge on her findings of fact and yet award benefits because in our judgment the findings do not establish misconduct. We even agree with the Administrative Law Judge's conclusion of law that the Claimant's "errors were not deliberate." Decision of Administrative Law Judge, p. 3. We part company with the Administrative Law Judge

because we find that the Employer has failed to prove that the errors were the result of anything more than the Claimant's inability to do the job.

We are guided in our analysis by Kelly v. Iowa Dept. of Job Service, 386 N.W.2d 552 (Iowa App. 1986). In Kelly the claimant was terminated because he inadequately cleaned the school stage. Mr. Kelly had previously been warned about poor performance. Yet Mr. Kelly testified that he tried to do the best job he could. The Board in Kelly had found misconduct based on the employer's testimony that Mr. Kelly was capable of doing a good job of cleaning but did not. The Court of Appeals reversed the finding of misconduct on the basis that the Employer's opinion that a Claimant could do better was inadequate to prove misconduct. To hold otherwise would mean that "[e]very employer could defeat an unemployment claim by merely testifying that an employee was capable, didn't do the job to the employer's satisfaction, and was therefore guilty of misconduct." Kelly at 555. The Court thus held that "[t]he employer's subjective judgment is proof of dissatisfaction but, without more, is not proof of misconduct." Id. Also instructive is Richers v. Iowa Dept. of Job Service, 479 N.W.2d 308 (Iowa 1991) where the Court noted that the employee "faced several management problems of great magnitude" and that "the fact that she did not recognize the trust deposit problems to be of greater importance to her employer… does not prove misconduct." Id at 312.

Following Kelly, then, we cannot base a disqualification decision on subjective opinion that the Claimant was capable but didn't do the job to the Employer's satisfaction. Instead we must base such a conclusion on the record evidence. Yet the record does not establish by a preponderance that the Claimant was intentionally performing poorly. Instead the evidence tends to establish that like the claimant in Richers the Claimant was simply overwhelmed. That she was unable to handle everything that she was faced with by no means makes her recklessly careless or deliberately indifferent to the Employer's interests. Moreover the Employer has failed to show that the Claimant rejected offers of help, in the form of proffered demotions, rather than that she simply misunderstood those offers as threats of possible adverse employment action. Furthermore, even if the Employer had shown the Claimant rejected offers of demotion we would not find the Claimant committed misconduct merely by trying – gamely but unwisely – to "stick this out until the bitter end." (Tran at p. 29). The Claimant did, as we have found, attempt to benefit from training but she just was not able to undergo training and still get all her duties done.

The record establishes, at the worst, that the Claimant tried her best but her best was not good enough. (Tran at p. 27-28). The Employer has not established that the Claimant was purposely doing a bad job. We do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which [s]he usually worked." Lee v. Employment Appeal Board, 616 NW2d 661, 668 (Iowa 2000). A simple incapacity is not misconduct. Newman v. IDJS, 351 N.W2d 806 (Iowa 1984). When a disqualification for misconduct is based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. In short, poor work performance is not misconduct. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988); 871 IAC 24.32(1)(a). The record at the most shows no more than this – poor performance resulting from incapacity – and the Claimant is therefore not disqualified from benefits.

DECISION:

The administrative law judge's decision dated January 27, 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.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss

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 Kuester

RRA/ss