

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
Website: eab.iowa.gov**

ZACHERY M COUNTER

Claimant

: **APPEAL NUMBER:** 23B-UI-09755

: **ALJ HEARING NUMBER:** 23A-UI-09755

:

and

:

**EMPLOYMENT APPEAL BOARD
DECISION**

:

SEABOARD TRIUMPH FOODS LLC

:

:

Employer

:

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

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. 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:

The Administrative Law Judge's Findings of Fact are adopted by the Board as its own.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5 provides:

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

a. 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.

....

d. For the purposes of this subsection, “misconduct” means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee’s contract of employment. Misconduct is 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 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual’s employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer’s property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer’s premises in violation of the employer’s employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer’s premises in violation of the employer’s employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual’s regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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); Iowa Code §96.6(1). 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).

Even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer] and not by the claimant, does not diminish the probative value of it"). Thus judgment is not automatic when the party with the burden fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

This case turns on the final violation of the Claimant. The Claimant was aware in general of a food safety policy. But that policy is not in evidence, nor do we have evidence that this sort of violation ordinarily results in termination for a single violation. And this Claimant has no discipline history established by the Employer. All agree that the Claimant was imprudent, perhaps even foolish, in how he acted. But he was not malicious, he just wasn't thinking about the food safety policy. Based on the particular circumstances of this case, especially the lack of any proof of prior discipline for anything similar over the Claimant's two and a half years of employment, we cannot find that this was "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" as set out in the Code of Iowa.


The Board understands that the food safety policy is important, and that state and federal law may be 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). 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.

Note to Employer: The procedural aspects of this case are a little odd. The Employer did not attend the hearing. We do not know if the Employer had a legally sufficient excuse for not attending since it has filed no argument with the Board. We recognize, of course, that until today the Employer had prevailed and thus has no reason to try to explain the absence at hearing. We point this out now so that the Employer is explicitly aware of the ability to apply for rehearing of today’s decision within 20 days of issuance of today’s decision. The Employer may make whatever argument for reopening that the Employer thinks appropriate, and this would include argument explaining why the Employer failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is not flexible and may not be extended.

DECISION:

The administrative law judge’s decision dated November 1, 2023 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.



James M. Strohman



Ashley R. Koopmans



Myron R. Linn