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

GLEN HOLSATHER

Claimant,

and

NEW TEC INC

Employer.

HEARING NUMBER: 09B-UI-01215

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: 96.5-1

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:

Glen Holsather (Claimant) was employed as a full-time business manager/CFO for New Tec (Employer) from June 16, 2008 to October 8, 2008. (Tran at p. 3; p. 4; p. 13; Ex. 1). Around October 1, 2008, Partner Scott Hulstein met with the Claimant and said he wanted the profit centers estimate and the business plan for expansion into Sioux Falls done by October 8, 2008. (Tran at p. 8; p. 13-14). The Claimant indicated he could not get both done by that date but he was working on them and wanted to do the job right. (Tran at p. 8; p. 14). Mr. Hulstein again said he needed those documents by October 8, 2008, and the Claimant repeated that they would not be done. (Tran at p. 8; p. 14). On October 8, 2008, the parties met and President John Byl joined them. (Tran at p. 5; p. 7; p. 15). The Claimant had been told that he could not longer be apart of the Employer and that things were not working out. (Tran at p. 14; p. 15; p. 17). The Claimant resigned in lieu of being discharged by the Employer. (Tran at p.

3; p. 15; p. 17; p. 18; p. 19). His resignation was not voluntary but was compelled as his only other option was termination. (Cert. Rec. at p. 17; p. 18; p. 19).

REASONING AND CONCLUSIONS OF LAW:

Quit versus Discharge: Iowa Administrative Code 871–24.25 provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

"[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). The rules of Iowa Workforce Development specify:

> 871–24.26 Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

871 IAC 24.26(1). As we have found the Claimant faced a choice between quitting or being fired. It was clear at the time the Claimant quit that if he did not do so he was to be terminated. This, under the rules, is not to be considered a voluntary quit. Although the regulations do not explicitly say so, we do not think that a Claimant get benefits automatically in such situations. Rather the fact that the compelled quit "shall not be considered a voluntary leaving" means that it shall be considered a termination and that the issue of misconduct must be resolved. We now turn to that issue.

Termination for Misconduct: 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).

The most that this record reveals is that the Claimant was unable to perform his work to the satisfaction of the Employer. The Employer has not established that the Claimant was merely lazing around, but only that he was not able to get everything done. 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). The facts do not support any finding of deliberate errors by the Claimant nor negligence of such a degree as to manifest equal culpability. 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 establishes no more than poor work performance

and the Claimant is therefore not disqualified for misconduct.

DECISION:

The administrative law judge's decision dated February 20, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. 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

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.

_____
Monique Kuester

RRA/fnv