

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

JAY D GOTTSCHALK

Claimant

and

THEISENS INC

Employer

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HEARING NUMBER: 16B-UI-10756

**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, 96.3-7

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 Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following modifications:

The Claimant (Jay) performed a gun count every morning and evening that he worked. (*11:04-11:27; *31:53-32:00; *43:17-43:22; *43:32-43:37) When he arrived, he obtained the keys to the gun cabinet and returned to the back where the guns were located. (*8:00-8:03) He'd unlock the gun cabinet, count the guns inside, and record his count in the designated notebook. (*8:03-8:19; 11:29-11:37; 11:42-11:50; 12:00; Exhibit 6) Jay would then go to the safe, open it, and count the guns in there. (*8:21-8:37) After he counted the hand guns, he would record his count on a piece of paper, then compare it to the prior night shift's count. (*14:55-15:11) If the number matched up, he officially recorded the count; if the number did not line up, he would recount several times before having to call the store manager to report a miscount. (*15:13-15:33)

On Sundays, the Claimant usually worked with Nick Accola whom Jay had count guns at the end of their shift. Jay would re-count them Monday morning in order to catch any potential discrepancy. (32:00-32:35) No one ever told the Claimant not to depend on the previous night's count, but he knew if the count was off, he should contact management. (*15:45-16:00)

The Claimant worked alone February 22nd at a time when the store was very busy. He not only assisted customers, but was later asked by an assistant manager to make a run to the warehouse. When Jay left to the warehouse, he inadvertently his left his gun cabinet keys in the lock, which many associates had done. (34:55-37:17)

The gun safe under the computer desk was oftentimes left unlocked. (*37:33-38:34) After Jay left it unlocked for which he was reprimanded, the Employer changed their method of securing the keys. (*39:05-39:21)

The Employer allows the associates to count boxes without opening them to count the gun inside. (42:42; 43:22-43:25) On March 31, 2016, a part-time employee (Dan Toma) took a gun out of its box and returned the empty box into the safe, where it later got mistakenly counted by all associates who were subsequently reprimanded. (1:05:18-1:05:31; *33:42-34:34)

On August 18th, the Claimant's gun count matched the night shift's (Cody's) count. (*16:43-16:58)

Jay counted the guns on August 19th using the same protocol he used every day and came up with the same number as the prior night shift's count (by Nick), again at 178. (*17:15-17:40)

Unbeknownst to the Claimant when he started on August 20th, Nick had miscounted by three the night before. (*19:50-20:00; *21:23-21:31) When Jay counted that morning, he counted and came up with 175 guns also. (*22:13-22:15) On the 21st, the Claimant found a gun in a safe that was tipped behind the other handguns he had already counted three times (*27:26; *40:27-41:00), which caused the previous day's gun count to be further off than he realized due to the night shift's miscount. (51:34-51:40; *22:34-22:53; *23:24-23:28; *23:39-24:34; *27:16-27:21) He notified Ms. Byers that his initial gun count was off (20:37-20:50; 29:04-29:10; 51:35; *24:38-24:40; *27:28-27:46) to which she investigated.

Two days later, she notified the Employer of the situation (20:28-20:29) and Mr. Gottschalk was subsequently terminated for not counting the 'pistols'. (20:59-21:07; *31:35; *39:50-39:55; 43:24-43:43:30) Neither Nick nor Cody was terminated for the same miscounting; they were merely reprimanded. (55:29-55:56) Other personnel, including management, had miscounted guns in the past and the matter was quickly remedied. (*44:45-44:51; *45:05-45:25)

(* Denotes 2nd recording)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

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 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 attribute more weight to the Claimant's version of events. The Employer terminated the Claimant solely for miscounting guns on August 21, 2016 even though there were other personnel involved in this error who were not terminated. (55:29-55:56; 1:04:35-1:4:51) The Claimant provided unrefuted testimony that when others, including management, had miscounted guns in the past, the matter was resolved and no one lost their jobs. (*44:45-44:51; *45:05-45:25)

Mr. Gottschalk vehemently denies simply copying the night shift's report and not personally counting the guns on a daily basis as required, especially on the nights on August 21, 2016. (*6:55-7:00; *43:55-44:15; *46:50-46:56) Evidence shows that Jay had only two incidents of miscounting guns throughout his four years of employment. (1:05:00-1:05:10) As for the first incident on March 31, 2016, the Claimant's miscounting of an empty box was due to another employee's mistake. (1:05:18-1:05:31; *33:42-34:34; Exhibit 2) Jay's miscount was not intentional, as he counted this box without opening it as he had done

with all the other boxes. The record contains no evidence to support that there was anything different about this empty box on the outside that would have alerted Jay to open it to check for a gun. Even the Employer admitted that associates are not required to open gun boxes when counting inventory. (42:42; 43:22-43:25)

As for the final incident that led to his termination, the Employer admitted that the error originated with Nick's failure to count the three guns on the evening of the 19th that had been added into the system. (49:50-50:15) Yet, Nick wasn't terminated for the same alleged offense. (55:29-55:56) Jay counted as he normally would, but came up with the same number as Nick simply because the number he arrived at was the number of guns he actually counted. It wasn't until Jay was in the midst of his count that he discovered a box containing another gun that had fallen behind the other boxes of guns, which affected his outcome. He complied with company policy by following protocol when he contacted management to rectify the matter. It is clear that the Claimant worked to the best of his ability in fulfilling this job responsibility. His failure to initially catch the error was not an intentional act or a disregard of the Employer's interests; rather, it was due to confusion on the part of two other employees that started prior to the actual day the error came to light.

The Employer also argues that past write-ups, i.e., influenced their decision to terminate, even though these other infractions were not mentioned to Jay during their final meeting. Even if we were to consider these past acts, we find that the February 22nd incident was mitigated by the busy and chaotic circumstances of that morning, coupled with the unrefuted testimony that leaving the keys in the gun cabinet while unlocked was a somewhat common occurrence. Several other associates routinely left it unlocked to the point that the Employer eventually changed protocol to eliminate this mishap. While we do not condone the Claimant's absence of mind to lock the gun cabinet and take away the key, the fact that he didn't on this day was clearly not an intentional act, but rather an oversight resulting from a hectic period of business when no other person was around to assist him.

Based on this record, we fail to see a pattern of carelessness or negligence in gun counting, or otherwise, on the Claimant's part such that his behavior could be considered misconduct by its legal definition. His last write-up occurred in April of 2016 for that March 31st incident, which was not his fault. He had no other write-ups for gun miscount until August, which clearly involved other individuals, and resulted in his termination alone. (*44:48-45:20) In addition, the Employer had no firsthand knowledge of that final incident such that would outweigh the overall credibility of the Claimant's version of events. For this reason, we conclude that the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated November 3, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohmman