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

GARY D OLDS Claimant, and DES STAFFING SERVICES INC Employer.	:	HEARING NUMBER: 07B-UI-09037 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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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 **REMANDS** as set forth below.

FINDINGS OF FACT:

Gary Olds (Claimant) worked for Des Staffing Services, Inc. (Employer) from July 6, 2007. (Tran at p. 3; p. 7). He was removed from his most recent assignment on August 14, 2007. (Tran at p. 3; p. 7). The Claimant had been assigned to work as a production worker at Egg Belt Company. (Tran at p. 3-4). On his last day at Egg Belt, the Claimant was instructed to work on a "glue machine." (Tran at p. 4). The Claimant was completely unfamiliar with this machine. (Tran at p. 4; p. 5). The machine needed repair and the Claimant was expected to attempt the repair. (Tran at p. 4-5). The Claimant was concerned that, since he was ignorant of the operation of the machine, the lines might explode and get glue in his eyes. (Tran at p. 5). The Claimant has seen this happen twice in his time there and emergency steps are required to

minimize injury. (Tran at p. 5). The Claimant was concerned that something of this sort might occur if he attempted repairs with no knowledge of the machine and thus he wanted a maintenance worker nearby while he worked on the machine in order to train him on how to safely perform this work. (Tran at p. 5). The Claimant told his supervisor about his concerns. (Tran at p. 5-6). The Claimant was nevertheless required to attempt to repair the glue machine. (Tran at p. 5-6). The Claimant refused and was removed from his temporary assignment for this. (Tran at p. 6; p. 9). The Claimant remained eligible for reassignment despite the ending of his assignment with Egg Belt. (Tran at p. 9; p. 10).

REASONING AND CONCLUSIONS OF LAW:

Discharge Issues: There is a question whether a temporary employee who is removed from an assignment based on misconduct but who remains available to reassignment to other clients can be disqualified for misconduct. Such an employee may very well remain eligible, despite the misconduct, since they remain employed and are not discharged. C.f. 871–22.3(5)(c)(2)(report to be filed by temporary employment agency not the client since "the individual shall be considered to be the employee of the leasing company"). In this case we do not resolve this issue since we do not feel the Employer has proved misconduct.

Iowa Code Section 96.5(2)(a) (2007) 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).

More specifically, continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." Myers v. IDJS, 373 N.W.2d 507, 510 (Iowa 1983)(quoting Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review, 19 Cmwlth. 475, 338 A.2d 794, 796 (1975)); Pierce v. IDJS, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985). Good faith under this standard is not determined by the Petitioner's subjective understanding. Good faith is measured by an objective standard of reasonableness. "The key question is what a reasonable person would have believed under the circumstances." Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988); accord O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993)(objective good faith is test in quits for good cause).

The Employer has the burden of proof and yet produced no witness with sufficient knowledge of the situation to rebut the Claimant's claim of safety concerns. There was no witness from the Employer who was familiar with the machine, or with the Claimant's training, or with the situation on the floor that day. The Claimant testified that he had seen the machine malfunction in a dangerous way and that he was concerned for his safety if he were to attempt repairs on a machine he knew nothing about. We cannot say, in the absence of any first-hand testimony about the machine or the Claimant's behavior, that the Employer has proved the Claimant's fears to be objectively unreasonable.

Remand: Since the Claimant remained eligible for reassignment we need to now determine whether the Claimant, and the Employer, satisfied the requirements of Iowa Code §96.5(1)(j). That section provides:

> An individual shall be disqualified for benefits:
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> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department, but

the individual shall not be disqualified if the department finds that:

j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

> To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.
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> For the purposes of this paragraph:
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> (1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
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> (2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Here the Administrative Law Judge received only a smattering of testimony on the Iowa Code §96.5(1)(j) requirements. We know that the Claimant did timely report the end of the assignment, but this is all. (Tran at p. 7; p. 9; p. 10). It is not entirely clear whether the Claimant sought reassignment as, for one thing, there is no testimony from the Claimant on this point. As the Iowa Court of Appeals noted in Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise. We therefore remand this matter on the issue of voluntary quit. We emphasize that no disqualification under §96.5(2) may be imposed since we have today found no misconduct proved. On remand, the issue will be whether the Claimant voluntarily quit his employment with DES Staffing by not complying with Iowa Code §96.5(1)(j) and whether the Employer likewise complied with its obligations under that paragraph.

DECISION:

The decision of the administrative law judge dated October 15, 2007, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section for the limited purpose of taking additional evidence that is consistent with the Board's decision. The administrative law judge shall then issue a new decision in consideration of that additional evidence that provides the parties appeal rights.

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Elizabeth L. Seiser

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John A. Peno

RRA/fnv

DISSENTING OPINION OF MARY ANN SPICER:

Mr. Olds refused to work online as directed according to the employer and the claimant validated the statement by saying he did refuse to repair a machine (Testimony Page 4, Lines 31-32 and Testimony Page 7 Lines 31-32 and Page 8 Lines 1 – 33). Since the statement of Mr. Olds not following the employer's directive to work on a machine was not refuted, and the failure of the claimant not to follow the directive was not a misunderstanding as articulated in the claimant's testimony which evinces a willful and wanton disregard of the employer's interest depicting insubordination which is clearly misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W. 2d 230 (Iowa App. 1990). As result of this evidence I would affirm the decision of the Administrative law Judge and deny benefits. In addition, even ignoring the issue of misconduct by the Claimant, I would not remand this matter since the Claimant failed to return and request assignment from the Employer. (Testimony Page 11, Lines 5-8). In addition to being disqualified for the misconduct the Claimant is disqualified under Iowa Code §96.5(1)(j).

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Mary Ann Spicer

RRA/fnv