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

LEVI G LANDPHAIR	:	
	:	HEARING NUMBER: 09B-UI-06171
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
HUENEMAN FARMS LC	:	
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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Levi G. Landphair, worked for Hueneman Farms, LC from December 15, 2008 through January 23, 2009 as a full-time employee. (Tr. 2, 18) The employer has a drug policy that provides "… if there's reasonable suspicion… a breath test or urine test can be … required…," but that policy only pertains to truck drivers and not shop personnel. (Tr. 3, 8, 9)

The claimant never worked Saturdays because he is a member of the National Guard. (Tr. 11-12, 17, 19) He never received any verbal warnings about not working Saturdays, nor was he ever told or required to work Saturdays. (Tr. 21-22, 24)

The claimant reported to work on January 15, 2009 appearing hung-over after drinking the night before. (Tr. 9) Mr. Hueneman, the owner, spoke with the claimant and issued a written warning, which indicated that if Mr. Landphair reported to work again in that condition, he would be terminated. (Tr. 2, 6-7, 10, 11, 24, 26) The claimant signed the document in acknowledgement of its terms. (Tr. 6, 21) The employer did not offer him a sobriety test and the claimant worked the entire day. (Tr. 21, 26)

The employer expected Mr. Landphair to work on Saturday, January 24th as every other shop person did (Tr. 12, 25), but the claimant did not report. The following Monday, Mr. Landphair walked to work and arrived shortly before 8:00 a.m. (Tr. 20, 22-23, 25) He immediately started his waste removal duties. (Tr. 23) The owner approached him inquiring about why he didn't report to work on Saturday for which Mr. Landphair had nothing to say because he didn't know he was supposed to work that day. (Tr. 23) The employer assumed he was intoxicated again based on his demeanor (wearing a hat) and shortly thereafter (10 minutes), he was terminated. (Tr. 7, 16, 24)

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:
>
> 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).

Both parties agree that the claimant worked all day on January 15th (Tr. 10, 21, 26), the day he allegedly came to work intoxicated and received a warning. (Tr. 2, 6-7, 10, 11, 24, 26) Additionally, there is no dispute that this was the only warning ever documented against the claimant, even though the employer argues that Mr. Landphair received numerous verbal warnings. (Tr. 6) In accordance with the employer's policy, the claimant should have been offered a drug test and treatment given their suspicion. However, given the fact that the employer never submitted the claimant to a drug or alcohol test, we find it suspect that the claimant was, in fact, under the influence of alcohol as the employer so alleges. It would seem that if the claimant was so impaired that he would not have been allowed to remain at work for the remainder of his shift.

With regard to the claimant's second infraction, neither of the employer's witnesses (Ms. Hueneman and Jerry Pringnitz) was present at either incident. (Tr. 5, 11, 12) Mr. Pringnitz's response that he, basically, couldn't remember if he saw the claimant with his sunglasses off is, at best, evasive and cagey. (Tr. 13) Additionally, Pringnitz couldn't remember if he even talked to Mr. Landphair and couldn't speak with certainty that the claimant responded to any questions asked of him. (Tr. 13-14) Thus, the employer provided only hearsay testimony as to the claimant's alleged intoxicated demeanor on January 26th. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency (Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 [Iowa 1995]), the agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982) In addition, the entire record must be examined to see if it rises to the necessary levels of trustworthy credibility and accuracy to meet the "reasonably prudent person" criteria. Schmitz v. Iowa Dept. of Human Services, 461 N.W.2d 603 (Iowa App. 1990)

Mr. Landphair denied that he reported to work intoxicated, hung-over or otherwise. The employer's testimony that he was intoxicated and subject to termination particularly in light of his first and final warning, was based on his alleged wearing of a hat and sunglasses, which the claimant vehemently denied. And even if the claimant were wearing said apparel, that fact in and of itself, is not probative of intoxication. The employer did not refute the claimant's testimony that he walked 20 minutes in cold, winter weather ("… pretty severe wind chill…") to get to work that morning. Tr. 22) If Landphair did keep his hat on shortly after arriving to work, it would *not* have been wholly unreasonable given the circumstances. If his eyes weren't 'bright and bushy-tailed' (Tr. 13), it could have reasonably been attributed to the claimant's admitted difficulty sleeping the night before. (Tr. 20)

As for the claimant's purported failure to report to work the previous Saturday, it would have certainly been a first time since he had never been required in the past. And the employer's argument that everybody else in the shop was required to work Saturdays is not probative that the claimant was required or scheduled to work January 24th. (Tr. 12) The claimant provided numerous timecards to corroborate the claimant's testimony that he didn't work Saturdays due to his National Guard obligations. (Tr. 11-12) Assuming for the sake of argument that he was required to work on the 24th and he failed to do so, it would have merely been an isolated instance of poor judgment that didn't rise to the legal definition of misconduct.

Based on this record, we conclude that the employer failed to provide substantial evidence to prove their case.

DECISION:

The administrative law judge's decision dated May 20, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

_____
Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. 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 F. Kuester

AMG/fnv