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

MELEHIA FRAUENHOLTZ

Claimant

and

HY-VEE INC

Employer

HEARING NUMBER: 17BUI-05656

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 Employer 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:

Melehia Frauenholtz (Claimant) worked as a full-time pharmacist for Hy Vee, Inc. (Employer) from October 31, 2016 until she was fired on May 5, 2017.

The Claimant oversaw employer's pharmacies at several of Employer's stores when she was on duty.

On January 27, 2017 the Claimant laid down while reading in the pharmacy. The Employer observed this on its security footage. Claimant was given a written warning on that date for engaging in behavior the employer deemed unprofessional, namely, the lying down in the pharmacy. The Claimant also made several errors as detailed in Exhibit 7, involving wrong

documentation being sent with patients, wrong medications, and inaccurate record keeping. (Ex. 7).

On April 30, 2017 the Claimant was late by 20 minutes and as a result the pharmacy was opened late. On that day she also filled a prescription but paid for it incorrectly, a mistake caught by a pharmacy tech. She was warned over these incidents on May 1, 2017.

On May 4, 2017 the Claimant was not feeling well and she slept in her car during her lunch break. The Claimant came back to work approximately 20 minutes late. While working in the pharmacy the Claimant laid her head down on the counter five times from 2:00 to 2:20. Each time she laid her head down for a minute or two. The Claimant had her head on the counter from 2:06-2:09, lifted her head briefly, then had her head down from 2:09-2:13, again briefly lifted up, then had her head down from 2:14-2:15, then again had her head down from 2:17-2:18, and then from 2:18-2:20 she again rested her head on the counter. A pharmacy tech noticed this and notified the store director, Amy Kramer. Ms. Kramer then came into the pharmacy, asked the Claimant what was going on, and told the Claimant that she needed to be working. The Claimant was discharged for resting her head on the counter in light of her prior warning.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) 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 law specifies that prior bad acts may affect the determination of misconduct:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); *accord Johnson v EAB* 585 NW2d 269 (Iowa 1998); *Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB,* 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985).
Under this rule, even if a final act is, in isolation, insufficient to constitute misconduct it can rise to that level when the prior bad acts are used to enhance the magnitude of the latest act. Further, past instances of discipline, like a suspension or a final warning, can make any further incidents much more serious than they would otherwise be. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984). In short, the Employment Security Law recognizes the concept of the "straw that broke the camel's back." *Ray v. EAB*, 398 N.W.2d 191, 195 (Iowa App. 1986).

The Claimant was a fairly short term worker. She already had had two warnings in her tenure both of which involved inaccuracy in how she performed her duties. In the first, and more serious, of these the Claimant was warned because she committed substantial errors and had been lying down at work. The Claimant was thus on notice that if she was so tired that she could not maintain her focus the remedy was *not* to rest herself at work. In spite of this notice the Claimant on her last day laid her head down five times. While this might not be misconduct in isolation, given her prior warning on January 27, and the fact that someone who legitimately needs that much rest would be at an enhanced risk of the exact type of errors the Claimant had made in the past, we find that her decision to rest in this manner was misconduct. We find this is so even though the Claimant did not fall asleep while she was resting. It is the repeated decision to rest in this manner, after warning, that constitutes a willful or wanton disregard of the Employer's interests. *See Hurtado v. Iowa Dept. of Job Service*, 393 N.W.2d 309, 311 (Iowa 1986("even if [Claimant]'s statement of reasons was believed, … his unilateral and undisclosed decision to rest his fatigued body at the time and place in question was, nevertheless, a willful or wanton disregard of the employer's interest.")

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated June 21, 2017 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time as the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Kim D. Schmett

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James M. Strohman

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

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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Ashley R. Koopmans

RRA/fnv