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

RANDY M WHALEN	:	
	:	HEARING NUMBER: 10B-UI-14706
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
FEDEX FREIGHT EAST INC	:	
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: 96.5-2A, 96.6-2

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. Two 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:

Randy Whalen (Claimant) was employed by FedEx Freight East (Employer) from August 26, 1996, until July 15, 2009, when he was discharged from employment. (Tran at p. 5-6; p. 15). Mr. Whalen held the position of full-time city driver and was paid by the hour. (Tran at p. 6). His immediate supervisor was Mr. Rich Bennett. (Tran at p. 6).

The Claimant had not received any discipline prior to his discharge. (Tran at p. 13). The Claimant was discharged for the stated reason of having taken an unauthorized break on June 30. (Tran at p. 6-7; p. 15). The Employer has failed to prove by a preponderance of the evidence that the Claimant in fact took an unauthorized break.

In addition to these findings we adopt as our own the findings of the Administrative Law Judge set forth in the second paragraph of the Administrative Law Judge's Findings of Fact (those relating to the timeliness of the appeal).

REASONING AND CONCLUSIONS OF LAW:

Timeliness: The Administrative Law Judge found, during the hearing, that the appeal was timely because of agency error. (Tran at p. 5). We affirm that decision.

We have found, in accord with the Administrative Law Judge, that the Claimant was at the local office, filled out his appeal, and was promised by an employee of Workforce that his appeal would be faxed to the Appeals Section. Only later did the Claimant learn that the promised FAX either was not sent by the local, or was lost by Appeals. We are aware that the rules of Workforce describe an appeal as being filed by its delivery to the Appeals section. Here either the local office or Appeals has mishandled the appeal. Regardless of which section made an error, the appeal was delivered to a local office and thus any delay in perfecting the appeal with the Appeals section then became the fault of the agency. This is the sort of error of Workforce that excuses the late faxing under rule 871-24.35(2). We find the Claimant's appeal to the Administrative Law Judge timely.

Misconduct In General: 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).

Weight of Evidence: On the alleged misconduct the Employer presents only hearsay. When the record in support of a party is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608. Even where the evidence is sufficiently reliable to be admissible under *Schmitz*, the weight to give the evidence may be affected by the same factors. "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005). For the sake of analysis we can regard the Employer's hearsay as properly admissible. Weighing the evidence, however, still favors the Claimant.

Applying the *Schmitz* factors to the evidence from the Employer: (1) the nature of the hearsay is that it is from an anonymous witness reporting what he (or she) allegedly saw (2) direct evidence of what was reported was available to the Employer by simply calling the witness (3) the cost of having the Employer's own employee testify has not been shown to be anything but minimal (4) there is a high need for more precision and (5) the policy to be fulfilled is laid out in the statute which places the burden of proving misconduct on the Employer. In this calculus the biggest hurdle for the Employer is that the source is anonymous, and that we have no way to assess the reliability of this informant. We know the source is salaried but this has absolutely no bearing on credibility. The Claimant argues that he has experienced some personal hostility from members of management which he states is perhaps related to his worker's compensation claim. We do not necessarily credit that information, but it is certainly a valid area for cross-examination, if the declarant had testified. Even if the declarant were known the Claimant could have at least had an idea how to go about addressing credibility questions. We don't even know *why* the declarant wished to remain anonymous. Questions of personal bias and

hostility are essential issues that are routinely explored on cross-examination. With the declarant unproduced and unidentified,

the evidence remains untested, and this greatly affects its weight. In short, we really would have been helped by the testimony of the person whose evidence is the key to this case. We agree with the Administrative Law Judge that little weight can be given to the anonymous statements, and we point out that the Administrative Law Judge cautioned the Employer that this would be the case if it chose to keep the informant anonymous. (Tran at p. 8-9).

The slightness of this evidence has implications for other evidence submitted by the Employer. For example, the fact that the Claimant's logs do not show him at the park in question is damning only if we believe the Employer proved the Claimant *was* at the park. The Employer's primary evidence of this is the hearsay that we find unreliable.

Added to this weak hearsay evidence the Employer has two facts. First, the Claimant took longer than expected to make deliveries. Second, the Claimant took longer than expected to return a call. Against this the Claimant denies that the truck was parked where the Employer alleges. (Tran at p. 16). He states that he was having delays in one of the deliveries because required equipment was not on site. (Tran at p. 19-20). Another delay was caused by damaged cartons. (Tran at p. 23). The Claimant further testified that sometimes notification of messages is delayed on the pager, and. More important in this case, that when notification does come delay can be caused by the need to find a pay phone. (Tran at p. 26). Finally, the Claimant had little experience with appointment freight, and the Employer felt he was generally a slow worker. (Tran at p. 25; p. 28). Thus there appears in the record credible alternative explanations for the delay in delivery and returning calls. On balance we cannot find the Employer's evidence sufficient to establish misconduct in the face of the evidence presented by the Claimant.

Application of Standards: As we have found, the Employer failed to prove that the final incident, which was the cause of the discharge, was misconduct. The discharge was thus not caused by misconduct and is therefore not disqualifying. *See generally, West v. Employment Appeal Board*, 489 N.W.2d 731, 734 (Iowa 1992)("must be a direct causal relation between the misconduct and the discharge"); *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). We thus find that the Claimant is not disqualified because the final act for which he was terminated has not been shown.

DECISION:

The administrative law judge's decision dated November 25, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (phone records) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv