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

WILLIAM D ALDRICH Claimant, and UNIPARTS OLSEN INC Employer.	:	HEARING NUMBER: 08B-UI-03833 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:

William Aldrich (Claimant) worked as a full-time machine operator for Uniparts Olsen, Inc. (Employer) from September 11, 2005 through the date of his discharge March 8, 2008. (Tran at p. 2; p. 5; Ex. 1). The Claimant had received a five-day suspension for his throwing parts and yelling at other employees on October 22, 2007. (Tran at p. 3). He was warned that his next occurrence of this nature could result in his termination. (Tran at p. 4).

On Saturday March 8, 2008 the Claimant got into an argument with co-worker Tony Haley. (Tran at p. 2; p. 3; p. 6; Ex. 1). Mr. Haley observed the Claimant staggering around and asked him if he was drunk. (Ex. 1). After an exchange of middle-finger salutes Mr. Haley pushed the Claimant's hand out of his face and the Claimant then shoved Mr. Haley. (Tran at p. 2; p. 3; p. 6; Ex. 1). Mr. Haley reported the incident to supervisor Bradley Anderson who then took the Claimant to manager Harlan Jewell's office. (Ex. 1). While on the way to the office the Claimant bumped into things and repeatedly stepped on Anderson's shoes. (Ex. 1). While in Jewell's office the Claimant was unsteady in his chair and knocked over trays on the table. (Ex. 1). Mr. Harlan told the Claimant that he thought the Claimant was under the influence of alcohol. (Ex. 1). Mr. Harlan told the Claimant that he would be tested for alcohol under the Employer's policy. (Ex. 1). The Claimant said "ok" but when the Employer went to take Claimant to the test the Claimant simply walked away saying "see ya." (Tran at p. 2-3; p. 9; Ex. 1). The Claimant was then informed that he would be terminated for refusing the test. (Ex. 1). The Claimant ignored this and walked away, again with a parting "see ya." (Tran at p. 2; Ex. 1). When the Claimant met with Human Resource Manager Becky Meyer he did not deny being drunk to her. (Tran at p. 3).

Under the Employer's published substance abuse policy in is a violation to be under the influence of alcohol while on duty. (Tran at p. 5; Ex. 1). The policy allows for alcohol testing based on reasonable suspicion if "management has reason to believe an employee is or has been under the influence of an intoxicant." (Ex. 1). Under the policy a reasonable basis for believing such a use has occurred includes observation of "the physical symptoms of being impaired due to drug and/or alcohol use." (Ex. 1).

REASONING AND CONCLUSIONS OF LAW:

Credibility: In making our findings today we find the Employer's evidence, even though it contains hearsay, to be more credible than the Claimant's denials. The hearsay is from multiple sources who all agree on the essentials of the Claimant's behavior. The statements are made soon after the incident in question. Two statements are signed by the witnesses and one is in his own handwriting. Mr. Haly's statement, moreover, makes several less than flattering admission about his own conduct which lends to it the ring of truth. Further some weight is due to Ms. Meyer's brief statement that the Claimant, while he may not have admitted being drunk, did not deny it to her. Also, the Claimant does admit to the shoving and that he was being "hollered at" as he walked away. Some admission may also be found in his reference to a change in medication as a possible explanation for his behavior. This seemingly is the Claimant admitting that *something* needed to be explained. Finally, the Claimant's version of events does not follow an expected course. The Claimant states that Mr. Haly started telling him what to do and that the Claimant told him to get out of his face. The Claimant then left. This explanation gives only the dispute with Mr. Haly as the entire reason for the Claimant deciding to walk home. This explanation of the Claimant's abrupt departure is less convincing than the Employer's version of events. On balance we find the consistent hearsay statements from multiple sources to be more credible than the Claimant different version of events.

Misconduct Standards: 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).

In this case the order that the Claimant refused was to take an alcohol test. The Claimant denies this refusal and so sets up no good faith justification for this refusal. This does not end the matter since if the order to undergo the test must be a lawful if defiance of the order is to be misconduct.

Reasonable Suspicion Testing: Iowa Code §730.5(8) sets out the conditions for employer drug testing in Iowa:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
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> … .
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> c. Employers may conduct reasonable suspicion drug or alcohol testing.

Here the Employer relies on the provision allowing reasonable suspicion tests. Iowa Code §730.5(1)"i" defines "reasonable suspicion":

> i. "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:
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> (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.
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> (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

Based on the credible evidence we have found that the Claimant was seen staggering, bumping into to things, stepping on shoes, knocking over trays, almost falling out of his chair and being belligerent with

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co-worker. Put together this was adequate to constitute observation of "manifestations of being impaired due to alcohol" sufficient to justify the requirement of an alcohol test. In addition we find that this conduct, in conjunction with the incident that led to his suspension, to be adequate evidence of "erratic behavior while at work" so as to constitute reasonable suspicion justifying the test. Since the command to take the test was lawful and reasonable, and since the Claimant's refusal is not justified by good faith, we find that the Employer has proven that the Claimant was guilty of misconduct in his insubordinate refusal to take the test.

DECISION:

The administrative law judge's decision dated May 6, 2008 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he 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".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

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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John A. Peno

RRA/fnv

The Employer has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED.**

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv