

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

SCOTT M BAUM

Claimant,

and

THE UNIVERSITY OF IOWA

Employer.

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HEARING NUMBER: 09B-UI-01130

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

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

DECISION

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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Scott Baum (Claimant) worked as a full-time parking facilities mechanic for the University of Iowa (Employer) October 14, 2002 until he was discharged on December 19, 2009. (Tran at p. 2-3; p. 11). The Claimant understood that the employer had zero-tolerance policy for employees hitting one another. (Tran at p. 20). The Claimant did not receive any warnings during his last three years of employment. (Tran at p. 9).

On December 14, 2008, the Claimant arrived at work and could not find his timecard. (Tran at p. 4; p. 11-12; p. 23). He was thinking about his time card when the parking dispatcher entered the office. (Tran

at p. 3; p. 4; p. 5; p. 12). The dispatcher is a shift supervisor, but was not the Claimant's supervisor. (Tran at p. 3; p. 10; p. 25). The dispatcher stood face-to-face with the Claimant. (Tran at p. 6-7; p. 12; p. 21; p. 23). The Claimant turned and in so doing made contact with him with his forearm or hand. (Tran at p. 12; p. 14; p. 15; p. 20). The dispatcher left the office. (Tran at p. 3-4). About five minutes later, the Claimant notified the dispatcher that he had found his timecard. (Tran at p. 4; p. 7; p. 17; p. 24).

At the end of the shift the Dispatcher reported the Claimant's actions to the Employer as being a punch in the stomach. (Tran at p. 3; p. 4; p. 15). The Employer took this to be that the Claimant had intentionally assaulted the dispatcher. (Tran at p. 3). The Employer suspended the claimant and later terminated him on December 19, 2009. (Tran at p. 2; p. 3; p. 8).

The Employer has failed to prove by a greater weight of the evidence that the Claimant intentionally struck his co-worker.

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.

"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).

Violence and threats can be disqualifying. *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995). Similarly, an employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995).

If we had found that the Claimant actually punched the dispatcher in the stomach we likely would be on board with the Administrative Law Judge. But we cannot find that anything like this has been proved. We find the Claimant's testimony credible, especially in light of the failure of the Employer to produce the alleged victim as a witness. Based on this finding of credibility we could find, at the most, that the Claimant made contact with the dispatcher in tight quarters. This is physical contact yet we cannot find that it constitutes an assault except in the most technical sense of the word. The contact has not been proved to have caused any injury at all, or to have been likely to have caused any injury, or to have been made with any significant amount of force. Even if we were to find the contact to be intentional we would find, under the circumstances, the making of contact was at the most an isolated error of judgment that would not be disqualifying.

DECISION:

The administrative law judge's decision dated May 4, 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.

John A. Peno

RRA/fnv

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE KUSTER:

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.

Monique F. Kuster

RRA/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 (documents) 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.

John A. Peno

Elizabeth L. Seiser

Monique F. Kuster

RRA/fnv