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

RAMONA K KUCERA Claimant and **ADVANCE SERVICES INC** Employer	:	**HEARING NUMBER:** 19BUI-04846 **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, 96.4-3

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board **AFFIRMS** the able and available issue as determined by the administrative law judge's decision. However, the Board **REVERSES** the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law as it relates to the separation issue.

FINDINGS OF FACT:

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following modifications:

Ms. Kucera and her daughter were present when Dr. Vineyard wrote out the Patient Status Report (PSR) on December 17, 2019. (19:21-19:24) It was at this point, she was given a carbon copy of the PSR form that she took to the front desk; had a copy made, which she subsequently sent to Attorney James Huffman. (19:33-20:00) The Claimant did not initially notice the “x’d” box signifying a restriction from repetitive sitting until it was pointed out to her. (21:17-21:19) The Claimant had only seen a carbon copy of the restrictions. (1:12:10-1:12:23) This was the first time the Employer requested that Ms. Kucera, personally, obtain a copy of the PSR to submit to the Employer. Previously, the Employer had always gotten the PSR forms directly from the physician’s office.

After speaking with the Client Services Team Lead (Mikki Johnson), Ms. Lynda Showalter (Employer's adjuster) sent an e-mail to the Employer noting "…this PSR was in fact altered…" (Exhibit 3) The Employer never received a copy of the original PSR from the provider; nor had the Employer ever personally spoken with the orthopedic doctor regarding the Claimant's restrictions as of December 17th, 2018. (31:45)

The Claimant requested another assignment from ASI on or about January 20, 2019 via voicemail; but received no response. (27:25-27:57) On March 28, 2019, the Employer contacted the Claimant by letter indicating they could accommodate her restrictions and there was light duty work available for her. (26:22-27:00)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Claimant's version of events. The Employer via Ms. Kim Warnick terminated Ms. Kucera for allegedly falsifying her work restrictions on the December 17, 2018 PSR. However, while the Employer's witness acknowledged Ms. Warnick was still employed at ASI, the Employer could offer no cogent explanation as to why the person responsible for the Claimant's termination was not available to testify. We note other firsthand witnesses to the alleged falsification were equally absent from this hearing. (23:17-24:50) According to the Employer's witness, the Claimant was not questioned about the alleged falsification prior to her discharge.

The record contains no evidence, i.e., the original December 17, 2019 PSR form from which the alleged falsified copies were made to contradict the Claimant's denial. (27:40) The Employer, admittedly, had no knowledge of whether the attending orthopedic doctor signed the PSR at issue, or whether he assigned a subordinate health care professional to sign the form. (27:00-27:04) When questioned about the checkmark on the 'restriction against sitting' box, the Clamant provided a plausible explanation that she reasonably believed someone in Dr. Vineyard's office must have initially checked it, then changed their mind and crossed it off. This explanation comports with her testimony the checkmark in the box appeared the same quality as the other marks, presumably because it was done on the original form, which she never had access to. (29:21-29:47; 1:11:18-1:12:23) In other words, the mark had not been penned in, or penciled in after the fact. By requesting the form from the Claimant, the Employer created additional lines in the chain of evidence regarding possibilities of altering the evidence. We note the Employer did not refute the Claimant's testimony; nor did the Employer submit any corroborating information regarding the original PSR such that we can definitively determine Exhibit 2 was, in fact, altered by the Claimant, as the e-mail indicated. (Exhibit 3)

871 IAC 24.32(4) provides:

> *Report required*. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The Claimant's denial that she altered the PSR is strengthened by her testimony that a sitting restriction was of no benefits to her for the type of jobs she was able and willing to do. The record supports the Claimant had no problem accepting whatever work was given to her within her restrictions. Why then would she have jeopardized her chances for continued employment when it didn't advance her circumstances? In addition, if the Employer terminated her because they believed she was dishonest, why would they ever offer her work again less than six months later? Based on this record, we conclude the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated July 29, 2019 is **AFFIRMED**, in part, as to the able and available issue for the time periods at issue; and **REVERSED**, in part, as to the separation. The

Employment Appeal Board concludes the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible. *The Board is also sending the attached document to the Iowa Workforce Development, Claims Bureau, for further consideration of the able and available issue.*

The Board would also note the Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

Lastly, the Board acknowledges a portion of the recording (CD #3 at 2:15 minutes) is largely inaudible. However, in our best estimation of that segment, there does not appear to be testimony of significant relevance to the outcome of this matter. Should either party disagree, that party should raise their concern in a rehearing application to the Board.

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Kim D. Schmett

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James M. Strohman

AMG/fnv