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

DANIEL L SULLIVAN Claimant and **O'REILLY AUTOMOTIVE INC** Employer	**HEARING NUMBER:** 19BUI-00714 **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:

Daniel Sullivan (Claimant) worked as a full-time delivery specialist for O'Reilly Automotive (Employer) from February 24, 2015 until he was fired on December 5, 2018. Throughout his career the Claimant had many customer service issues including taking the wrong parts to shops, and not following delivery instructions.

On April 18, 2017, the Claimant received a verbal warning in writing after making a delivery in the wrong order.

On August 25, 2017, the Claimant received a written warning for dropping off parts at Einks and going to Howard's without any parts because he dropped all the parts off at Einks. He did not return to Einks to get the Howard's parts.

On June 7, 2018, the Claimant received a final written warning for disrupting a customer who was working on his vehicle in the Employer's parking lot. The customer told the Claimant to stay away from him and then complained to the Employer the Claimant was bothering him. This was part of a pattern with the Claimant where multiple customers had requested he not be the one brining in their parts.

On December 5, 2018, the Claimant had deliveries in Waukon and Calmar. He asked Installer Service Specialist Mike Becker which he should do first. Mr. Becker told him to go to Calmar first. The Claimant instead went to Waukon first. The Calmar customer was very upset about the wait for parts. The Employer fired the Claimant for repeated delivery errors and customer service issues.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2018) 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).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). 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 considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Employer's version of events over the Claimant's.

We find that the Employer has proven carelessness and/or negligence in connection with each of the incidents that caused the termination, detailed in our findings. We find that the Employer has proven a pattern of carelessness by the Claimant of such a degree of recurrence as to constitute misconduct under rule 24.32(1)(a). In making the judgment that the Claimant's actions rose to the level of misconduct we also take into account purposeful decisions he made that exacerbated his negligence. In other words, the Claimant not only screwed up by being careless, but he then made it worse by how he reacted to the screw-up. So in the August 25, 2017 incident the Claimant not only erred in dropping off the wrong parts, but he then made the conscious choice not to try to make amends by returning to get the parts. Also in June 2018 the Claimant engaged in poor customer interactions by bothering the customer who had asked to be left alone. This is intentional action that shares with his acts of negligence a lack of concern and care taken to assure that the needs of the customer are satisfied. *See Wilharm v. EAB,* No. 16-1524 (Iowa App. 7/6/2017) (affirming denial of benefits based on driver who exacerbated negligence with how he intentionally chose to react to the problem he had created).

Putting together the negligence and choices the Claimant made in reacting to the problems he created with his negligence, we conclude that the Employer has proven a pattern of carelessness by the Claimant that is of "equal culpability" to a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees." "Culpability" is defined by Black's Law Dictionary to mean "blameworthiness." *See also Webster's Third International Dictionary, Unabridged*, (1961)(giving "blameworthiness" for definition of culpability). Black's goes on to provide that even in criminal cases "culpability requires a showing that the person acted purposely, knowingly, *recklessly, or negligently* with respect to each material element…" The word "culpable" is defined in Black's to mean "1. Guilty; *blameworthy* 2. *Involving the breach of a duty*." Webster's massive unabridged dictionary notes that the stronger sense of "culpable" meaning "criminal" is in fact "obsolete." Instead for modern definitions of "culpable" the 3rd unabridged gives "meriting

condemnation or censure esp. as criminal <~ plotters> <~ homicides> or *as conducive to accident*, loss, or disaster <~ *negligence*>." *Webster's Third International Dictionary, Unabridged*, (1961)(emphasis added). Applying the standards of rule 24.32(1)(a) governing repeated carelessness we find that the claimant's pattern of carelessness, along with his intentional behavior, proven on this record demonstrates carelessness of such a degree of recurrence as to constitute culpable negligence that is as equally culpable as intentional misconduct.

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.
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> 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.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (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 February 21, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time 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

Ashley R. Koopmans

DISSENTING OPINION OF JAMES M. STROHMAN:

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.

James M. Strohman

RRA/fnv