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

KORY MERRYFIELD	:	
	:	HEARING NUMBER: 07B-UI-09808
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
NEIGHBORHOOD PATROL 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: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimamt 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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Kory Merryfield, worked for the Neighborhood Patrol, Inc. October 20, 2005 through September 27, 2007 as a full-time security officer. (Tr. 2, 10) The claimant had a problem with excessive tardiness. On July 13, 2007, Ms. Merryfield was tardy approximately seven minutes. (Tr. 2) She was ten minutes late for her June 29, 2007 assignment, as well as was nearly one hour late on May 14, 2007. She had several other tardies previous to these dates. (Tr. 3) The employer issued numerous verbal warnings to Ms. Merryfield about her tardiness, but did not reduce those warnings to writing. (Tr. 5, 6, 7) The claimant also had difficulty wearing the appropriate uniform to work, i.e., leather shoes and a necktie (Tr. 7-8), as a result of the recent flooding of her home that left her living in a hotel. (Tr. 13)

Sometime in early September the claimant requested to have September 27th off so that she could accompany her children on a school field trip. (Tr. 11) The employer obliged her; however, on the evening of September 26th, the employer contacted the claimant to request that she report to work at 7:45 a.m. the following day (Tr. 4) for "… an hour to show somebody how to cover that shift…" (Tr. 11) Ms. Merryfield forewarned the employer that "… [she] had to drop [her] kids off at 8:00 a.m…." to which the employer responded, "fine, just get there as soon as possible as close to 8:00 as [she] could." (Tr. 11)

On September 27th, Ms. Merryfield arrived 25 minutes late (8:05 a.m.) to the assignment. (Tr. 5, 12, 14) In the meantime, the client had contacted the employer who, in turn, tried to contact the claimant, initially, without success. (Tr. 5) When the employer questioned her after she arrived, she reminded him of their conversation the night before regarding her childcare responsibility. (Tr. 12) Upset, the employer warned her, "… if this keeps continuing, … we'll just get rid of you…" to which Ms. Merryfield retorted that "[she] would have to start looking for another job if that was the case…" (Tr. 12) The employer terminated her because he 'didn't appreciate' her attitude. (Tr. 12-13)

REASONING AND CONCLUSIONS OF LAW:

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.

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).

871 IAC 24.32(7) provides:

> *Excessive unexcused absenteeism.* Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer testified that Ms. Merryfield had an ongoing tardiness problem for which he issued numerous verbal warnings that the claimant, essentially, had little recollection. (Tr. 10-11) The employer also admits that he never issued any written warnings because "… we try to be kind of easy to get along with. We don't like writing people up all the time…" (Tr. 5, 7) At no time was the claimant placed on notice that her job was in jeopardy.

As for the final incident, Ms. Merryfield provided unrefuted testimony that she requested, three weeks in advance, to have September 27th off to attend her child's field trip. The fact that she was late should have been no surprise to the employer as the claimant provided a reasonable forewarning to him the night before that she could not report to the assignment by 7:45 a.m. The employer understood this and verbally acquiesced by telling her to get there as soon as she could around 8:00 a.m., which she did when she arrived five minutes after the hour. (Tr. 5, 12, 14) Although the employer disputes this time, stating that it was 8:25 a.m., the employer failed to provide the client as a firsthand witness to refute Ms. Merryfield's account of her arrival time.

The employer, admittedly, was angered by the claimant's non-apologetic posture when he confronted her about being tardy that last day. Her purported insubordination was merely a response to the circumstance at hand, and not a regular occurrence. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

Here, the employer failed to establish that Ms. Merryfield's tardy on September 27th was

insubordination. Granted, had the employer taken progressive disciplinary measures against the claimant up to this point, the employer may have arguably had a stronger case for disqualifying misconduct. However, this record is void of any such evidence and, in fact, contains the employer's admission that they issued no such written warnings. Continued failure to follow reasonable instructions constitutes misconduct. 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 the instant case, Ms. Merryfield's final tardy should have been excused in light of the fact that the employer made a last minute request for her to report to work on her previously authorized day off. She had no choice, but to make necessary childcare arrangements to comply with the employer's request. (Tr. 12-13) The court in Woods v. Iowa Dept. of Job Service, 327 N.W.2d 768, 771 (Iowa App. 1982) held that an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause." We conclude that the claimant's failure to report to work was in good faith and for a good cause under the circumstances. For all the foregoing, we conclude that the employer has failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated November 7, 2007 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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Elizabeth L. Seiser

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John A. Peno

DISSENTING OPINION OF MARY ANN SPICER:

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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Mary Ann Spicer

AMG/kjo