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

JOHN YATES	:	
	:	**HEARING NUMBER:** 10B-UI-03958
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
DILLARD'S 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: 96.5-2A, 96.3-7

D E C I S I O N

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

FINDINGS OF FACT:

The claimant, John Yates, worked for Dillard's, Inc. from August 24, 2005 through February 11, 2010 as a full-time employee. (Tr. 2-3, 7-8) Mr. Yates was, initially, hired "…as a sales associate, a worked his way up into management…" (Tr. 3) His last position was that of dock manager (as of February 2008) (Tr. 5, 8) whose overall responsibilities involved "…the cleanliness of the store…making sure the lights in the building are working and operational…" (Tr. 3) The claimant had a crew of approximately seven people whose task it was to ensure that the store was clean on a daily basis. Part of the claimant's responsibilities also included unloading trucks and processing merchandise so that it gets to the correct floor in a timely manner. (Tr. 3-4)

The claimant experienced difficulty keeping up with his dock manager duties. "… [D]ock associates [weren't] allowed overtime unless it [was] approved…" (Tr. 8) On October 17, 2009, the employer issued a written warning to the claimant about his failure to complete tasks. He was placed on 30-days' probation in which he was to receive "…weekly or bi-weekly…" updates about his progress. (Tr. 8, 10) On January 11th, Mr. Yates received another written warning via fax, and again placed on 30-days probation. (Tr. 4, 10) The employer provided the claimant with a laundry list of tasks that needed to be done in an effort to assist him with completion of his job duties. (Tr. 8) The employer also walked through the store showing Mr. Yates all the tasks that needed to be done, which he had not previously known. (Tr. 10) He felt overwhelmed.

The claimant had to spread himself among a limited staff of people who were unable to complete all the tasks assigned. (Tr. 9-10) Mr. Yates attempted to recruit help, but was unsuccessful. (Tr. 9) Sometimes, he was taken from his regular duties and placed on special projects that required not only his attention, but assistance from some of his crew members. (Tr. 9) This hindered his ability to maintain his regular schedule because he would run out of hours for himself and his subordinates to complete their own regular work. (Tr. 9) On one occasion, Mr. Yates had to order 100 certegy stickers to replace on rack stands that he was reassured would get to him the next day. (Tr. 9) He didn't receive the order until nearly four days later. (Tr. 10) In addition, sales associates were not keeping up with their own housekeeping duties (clean and dust sales floors, wrap stands, mirrors and glass in the sales area) which created more work for the claimant. (Tr. 11)

Mr. Yates requested overtime to help him and his crew to complete tasks. He was granted no more than ten hours, which was inadequate, as he needed at least twenty to get the job done. (Tr. 12, 14) When he was able to successfully recruit another employee (a sales manager) to help in his area, the employer told him he needed to rely on his own people. (Tr. 13) Mr. Yates requested that an engineer help him to replace ballasts, which was a part of the store engineer's duties (Tr. 10), however, the employer told him to get the job done. (Tr. 13) Finally, on February 11, 2010, the employer terminated Mr. Yates for failure to timely complete his job duties.

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:
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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).

The record establishes that Mr. Yates was an otherwise fine employee based on his history of promotions. However, it is clear that the claimant was discharged for performance issues in his capacity as a dock manager. Even though the employer provided him on two occasions with a checklist of tasks to be completed, the claimant still had difficulty completed all that needed to be done. There is no evidence to support that Yates ever refused to do any job, rather, he was simply limited by time and manpower to meet the employer's expectations. The record shows that the employer hindered his progress in several ways, i.e., limited overtime to a mere 10 hours (Tr.12, 14), refusal to allow outside personnel to help him (store engineer, etc.) as well as refused to reinforce other personnel to maintain their own responsibilities, which negatively impacted the claimant's performance. (Tr. 11)

Mr. Yates made good faith efforts to improve his performance. He pointed out on several occasions that he needed additional time and personnel. Yet, at every juncture, the employer seemed to undermine his efforts. At some point, Mr. Yates learned that his efforts fell short in certain specific ways that were not made known to him until after he was placed on the second probationary status. (Tr. 8, 10) Had the employer monitored his progress and provided him with necessary feedback and assistance as the employer stated he would, then perhaps, the claimant may have been able to modify his methods to better comply with the employer's directive.

We disagree that Yates acted in any intentional manner to disregard the employer's interests. Rather, he was unable to successfully meet the employer's expectations based on time and personnel constraints, which he attempted to alleviate, but were outside his authority as a dock manager. The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. For this reason, we conclude that

the employer failed to satisfy their burden of proving job-disqualifying misconduct.

DECISION:

The administrative law judge's decision dated April 29, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

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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Monique F. Kuester

AMG/fnv