

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

TOMMY E REICH

Claimant

and

STELLAR INDUSTRIES INC

Employer

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HEARING NUMBER: 17BUI-00073

**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, 96.3-7

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:

Tommy Reich (Claimant) worked for Stellar Industries (Employer) as a full-time assembler from April 4, 2016 until he was fired on November 21, 2016 for the stated reason of falsification of his time card.

The Claimant overslept and was eighteen minutes late to work on Thursday November 17, 2016. The Claimant had filled out his time card on Monday the 14th for the entire week. This was a common practice at the plant where the Claimant worked and the Claimant's lead worker had approved the practice in the past. When the Claimant was late to work on November 17 he did not change or correct his time card right away. He looked for his lead worker Tim Eisenlohr but could not find him. The Claimant then spoke with Lucas, who assisted workers with such issues, and Lucas told the Claimant to fill out a "blue sheet." The Claimant could not find any of these

that day and forgot about the issue as he returned to work. The Claimant then spoke to Mr. Eisenlohr on Friday November 18 and explained the time card discrepancy. He was informed by Tim to get a blue sheet but again none were available at that time.

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The management learned that the Claimant had not corrected his time card because a co-worker had been concerned that the Claimant wasn't at his work station. The Claimant was fired for the stated reason of falsification of his time card based on this single incident. The Claimant had not been previously warned over a time card policy violation.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) 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).

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 Claimant's testimony that he understood it was common for workers to fill out time cards in advance, and that he had spoken with Mr. Eisenlohr on Friday about having been late and about correction to his time card. We find that the discrepancy in the Claimant's timecard was not the result of dishonesty. If we thought that the Claimant had intentionally sought to cover up his being late, or to falsify his time card, we almost certainly would disqualify for theft of time. *C.f. Tompkins-Kutcher v. EAB*, 11-0149 (Iowa App. 8/24/2011)(Employee who took a wasted \$10 container of soup from dumpster disqualified by Board). But we find no theft of time here, only at the worst a deviation from the policy on filling out timecards in advance. The Claimant may have violated policy in how he filled out his timecard in advance but given the credible evidence showing that this was a common practice *at the plant where the Claimant worked*, and was known to the Claimant's lead worker, we find that this was not sufficiently serious to rise to the level of a willful and wanton disregard of the Employer's interest.

DECISION:

The administrative law judge's decision dated January 30, 2017 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. The overpayment entered against Claimant in the amount of \$3,695 is vacated and set aside.

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DISSENTING OPINION OF KIM D. SCHMETT:

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.

Kim D. Schmett

RRA/fnv