

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

MARY A JAMES

Claimant

and

OSCEOLA FOODS LLC

Employer

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HEARING NUMBER: 16B-UI-02466

**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 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:

Mary James (Claimant) worked for Osceola Foods, Inc. (Employer) as a full-time quality control technician from October 26, 2015 until she was fired on January 21, 2016.

Initially, Claimant performed her job in a satisfactory manner. At the end of December 2015, the Claimant was suspended for one week. This was the result of two incidents. On December 28 she failed to do a required check that then caused a shut down for an extended amount of time. The Employer had intended to give a first written notice of discipline to the Claimant over this but on December 29 another incident occurred. On that date the Claimant had been calibrating thermometers. She reported temperatures at 180 degrees, which was the usual temperature, but in fact the temperature had been set to 160 degrees, which was different than normal. Despite this the Claimant still reported 180 degrees. While the Employer suspected falsification, the Claimant insisted she read 180 so the Employer gave her a second chance.

When added to the December 28 incident this incident caused the Employer to give the Claimant a second written notice of discipline with a 40 hour suspension. The Claimant was warned to perform checks according to the Employer's requirements on pain of termination.

After the Claimant returned to work on January 7, 2016, she continued to have errors in documentation and completing job duties. On January 8, 2016, Claimant failed to record her initials on the water activity machine calibration form. On January 11, 2016, the Claimant failed to complete a watery activity check. On January 12, 2016, the Claimant failed to complete a color score on the cook yield paperwork within the proper time frame. On January 14, 2016, the Claimant accidentally disposed of a water sample before testing it. On January 18, 2016, Claimant failed to complete a second reading for distilled water for precooked bacon.

The Claimant often performed multiple checks in a single shift, and she demonstrated she was capable of performing the required checks in general.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) 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 find that given the nature of the Claimant's job, and her training, plus the fact that the Claimant performed checks correctly multiple times a night, that the errors proven by the Employer were the result of negligence and not incapacity.

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). Specifically, 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 proven on this record demonstrates negligence 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.

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.

b. However, if the decision is subsequently reversed by higher authority:

- (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 March 22, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she 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.

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