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

ROSARIO DELEON	:	
	:	**HEARING NUMBER:** 14B-UI-04302
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
JOHN MORRELL & CO	:	
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 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:

Rosario Deleon (Claimant) worked as a full-time production worker for John Morrell & Co. (Employer) from January 8, 2007 until she was fired on March 20, 2014. The Claimant was injured at work on April 27, 2012. She had surgery for the injury in approximately October 2012. She did not return to work until November 7, 2013. Her doctor's note said that she should start normal duty for two-hour shifts daily for one week, after which she was to increase to four-hour shifts daily for two weeks. The Claimant never worked beyond four hours a day and typically worked less than two hours on most days up until the time of discharge. She told the employer she was unable to work beyond that.

Douglas Martin, M.D. performed an Independent Medical Examination (IME) on March 11, 2014, and Dr. Martin determined the Claimant had a 20-pound lifting restriction and was at maximum medical improvement. The Employer received the IME on March 19, 2014, but the Claimant's attorney had not reviewed it by that date.

When the Claimant came to work on the morning of March 20, 2014, the Employer handed her a transitional work assignment offer. The offer was within the new restrictions but not within the ones the Claimant had received from her own physician. The Claimant had a contested worker's compensation claim ongoing and was unsure what signing a form implementing new restrictions would mean for her. She refused to sign the form only so that she could consult her attorney about what the form meant. The Employer fired her for the stated reason of refusal to sign and to work within the new restrictions. (Ex. 1).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2014) 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).

More specifically, continued failure to follow reasonable instructions constitutes misconduct. *See Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *See Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982).

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); *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa Ct. App. 1988). "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).

As an initial matter, it is quite clear that the Claimant was fired on March 20. She returned and things happened which the Administrative Law Judge made findings about. They are irrelevant. By then the termination had already taken place and thus the after occurring events cannot have been the cause of the termination and by that token cannot be the basis of a disqualification. *Lee v. Employment Appeal Board*, 616 N.W.2d 661(Iowa 2000) (events taking place after termination cannot be foundation of disqualification); *Larson v. Employment Appeal Bd.,* 474 N.W.2d 570 (Iowa 1991) (only the cause of termination can disqualify). Perhaps had the Claimant secretly recorded the meeting at 2 p.m. this might bear on her credibility, although such recordings are not illegal. 18 U.S.C. §2511(2)(d)("It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication…"); *State v. Reid*, 394 N.W.2d 399, 205 (Iowa 1986); Iowa Code §727.8(2014)("one who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication"); *C.f. Campbell v. Miss. Employment Security Comm'n*, 782 So.2d 751, 755 (Miss. App. 2000)(tape recording of meeting with employer not misconduct). We believe the Claimant when she says she in good faith was confused and wanted to discuss the paper to be signed with her attorney for legitimate reasons. We do find the Claimant credible on these points and secretly, but legally, recording interaction with the Employer is not so dishonest that we think it significantly would undermine the Claimant's credibility even if it had been proven.

On the merits, we must balance the reasons the Claimant refused to sign the document right away with the Employer's reasons for insisting that she do so right away.

On the Claimant side of things, she had been working under certain restrictions without incident. Then she underwent an evaluation and only found out the results on the day she came to work and was asked to sign the transitional work assignment offer implementing the new restrictions. We find that any reasonable person would be confused and concerned about this process. It was entirely reasonable for the Claimant to want to have clarification from her attorney. Now we do not mean to suggest that an employee with a lawyer gets to run to that lawyer every time her employer makes a decision without consequence. We recognize Iowa has no general right to consult an attorney about work decisions made by the Employer. But the question in this case is what a reasonable person would have done. And the suddenness of the request, and its unanticipated nature, in as much as the restrictions had changed, sets this case apart from someone trying to willy-nilly challenge her Employer's decisions through an attorney. We find the Claimant had a good faith and reasonable basis for wanting to discuss the matter with her attorney. This good faith basis is further strengthened by the natural desire to make sure that the new work was safe, giventhe difference in the restrictions. We specifically have not, and do not, find that the Claimant was refusing to perform any work ever under the new restrictions, only that she intended a short delay while she consulted her attorney.

Against the Claimant's interests, the Employer has the generalized desire of any employer to have workers do as they are told. This interest is present in *any* insubordination case and so is nothing special to this case. The Employer here also has an interest is assuring that workers are not malingering and are doing such duties as they are medically capable of doing. These are important interests. But what the Employer has failed to demonstrate is what the hurry was. The restrictions were but one day old. For about four months the Claimant had been working under her old restrictions and the Employer's operations were seemingly unimpaired. What then was so urgent that the Employer could not give the Claimant some time to see her attorney before insisting that she immediately start working under the new restrictions? We perceive no such urgency justified in this record, indeed the Employer seems to suggest that a delay to talk to her attorney would have been reasonable. Now we emphasize the Employer is perfectly free to insist on such an immediate response and then to terminate for it. But while the Employer may have its own 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); *Breithaupt v. Employment Appeal Board*, 453 N. W. 2d 532, 535 (Iowa App. 1990); *Miller v. Employment Appeal Bd*., 423 N.W.2d 211, 213 (Iowa App.1988)("[D]istrict court erred in only focusing on whether petitioner's discharge was justified."). We find that the refusal to sign *immediately* was in good faith, and these reasons, in particular the desire to consult an attorney first, outweighed the Employer's interest in *immediate* compliance. *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982); *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985) *see also Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

Even assuming that the Employer based its decision on a supposed flat refusal to work under the different restrictions, we find that that no such flat refusal was proven by a preponderance of the evidence. To us, the Claimant's explanation at hearing for her refusal to sign is entirely credible, and as it was also in good faith and reasonable, we find no misconduct.

DECISION:

The administrative law judge's decision dated May 19, 2014 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.

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Cloyd (Robby) Robinson

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Ashley R. Koopmans

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.

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Kim D. Schmett

The Claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Kim D. Schmett

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Cloyd (Robby) Robinson

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Ashley R. Koopmans

RRA/fnv