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

JOHN M BYSE	:	
	:	**HEARING NUMBER:** 10B-UI-17503
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
PER MAR SECURITY & RESEARCH CORP	:	
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

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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

John Byse (Claimant) worked for Per Mar Security (Employer) as a part-time event staffer at football and basketball games, from August 18, 2008 until he was fired on about October 12, 2009. (Tran at p. 2-3). As part of his duties the Claimant directed traffic into and out of scheduled events for the Employer's client, the University of Iowa. (Tran at p. 2-3).

The Claimant believed that on-going problems with short staffing at events created significant risks to his safety, as well as the public's safety. (Tran at p. 8-10; p. 13; p. 22; Ex. 1). Other employees, some of long experience, had similar concerns. (Tran at p. 13-14; p. 16; p. 17; p. 20-21; Ex. 1). The Claimant, and others, had voiced the concerns about short-staffing to the Employer. (Tran at p. 8-10; p. 13; p. 14; p. 19). The Employer did not completely ignore the complaints, but neither did its actions significantly ameliorate them. (Tran at p. 8-10; p. 12; p. 13; p. 14; p. 16; p. 17-18; p. 20; p. 22).

On October 10 a supervisor sent some workers home before the end of the event. (Tran at p. 12-13; p. 25). This action meant that over half of the positions at the end of the event were not filled. (Tran at p. 12-13; p. 22-23; Ex. 1; Ex. A). The Claimant, and other lead workers, believed that this action endangered them. (Tran at p. 12-13; p. 15; p. 20-22). In reaction the Claimant on October 12, with the sanction of his coworkers, sent an email to the University on the worker's behalf stating that they believed there was a safety risk caused by chronic short staffing. (Tran at p. 4; p. 13-14; Ex. 1). The University told the Employer of the e-mail, and the Claimant was terminated for sending the e-mail. (Tran at p. 3; p. 5-6; p. 7).

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.

"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). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." *Myers v. IDJS*, 373 N.W.2d 507, 510 (Iowa 1983)(*quoting Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review*, 19 Cmwlth. 475, 338 A.2d 794, 796 (1975)); *Pierce v. IDJS*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). 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).

Here the Employer has failed to show a lack of good faith on the part of the Claimant. The concerns of the Claimant are clearly legitimate ones. His witness, a man of long experience in the field, confirmed that the risk was real, not imaginary. The employees had previously complained to the Employer about the problem, but the issues persisted despite action by the Employer. In fact, with the supervisor's actions of October 10 things got worse. In this context the Claimant decided to take things to the University, since it was on their property that the risk was created. This action, while understandably upsetting to the Employer, is not the most extreme form of action the Claimant could have taken. It was not highly publicized, and the information was shared with someone with a legitimate interest in the subject matter. This weighs in favor of the Claimant, as does the genuineness of the underlying safety concerns.

Against this we weigh the Employer's interests in controlling communication to its own clients, and in maintaining the chain of command. Both of these interests are significant ones. On balance, though, we think the Claimant acted in good faith and not out of any intent to cause harm to the Employer. He wanted to do the job, but do it safely. His internal complaints, he reasonably believed, were not achieving the necessary results. The Claimant made the judgment in good faith to take the issue up with the client, who after all, ran the event in question. Perhaps this good faith judgment was in error. "[G]ood faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute." 871 IAC 24.32(1)(a). Accordingly we allow benefits.

DECISION:

The administrative law judge's decision dated February 2, 2010 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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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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

RRA/fnv