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

JULIO A RODRIGUEZ	:	**HEARING NUMBER:** 11B-UI-02791
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
ABM LTD	:	
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: 96.5-1, 96.5-2-A

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, Julio A. Rodriquez, worked for ABM, Ltd. /ServiceMaster Green from August 27, 2009 through January 21, 2011 as a full-time janitor who worked the night shift. (Tr. 4-5, 7) On January 21, 2011, the claimant worked at Mercy Hospital (Tr. 13) as he had done for the past six months. (Tr. 9-10, 14) He usually placed all garbage, including recyclable materials, into garbage bags in the kitchen as he was trained to do. (13)

At some point, a doctor or nurse filed a report to the employer that they wanted the recyclables separated from the rest of the garbage and placed in a different container. (Tr. 13) The claimant's area supervisor, Luz Solano, directed the claimant to do so. (Tr. 5, 14) This was the first time Mr. Rodriguez was asked to perform this task (Tr. 14), which he believed was an additional responsibility and would require more time to complete the task. (Tr. 16, 18, 21) He was already working an

additional 5 hours, which resulted in

his working 38 hours/weekly (Tr. 16), and didn't think he was allowed to work more since he was considered full-time. (Tr. 7) He asked Ms. Solano if "…they were [going to give him] more time and more hours…" (Tr. 9, 10, 17, 18, 20) Ms. Solano went outside to speak with her immediate supervisor, Carlos Cardenas. (Tr. 10, 12, 17) When she returned, she directed Mr. Rodriguez to punch out and go home in accordance with Mr. Cardenas instructions. (Tr. 21, 23) She also told him to turn in his keys and ID. (Tr. 11-12, 19) The claimant believed he was terminated because he normally kept his keys at home with him over the weekend. (Tr. 12) Although Ms. Solano did not have the authority to terminate him, Mr. Cardenas did. (Tr. 6)

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:
>
> 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 supports that the separation was the direct effect of Mr. Rodriguez's inquiry about getting more hours and subsequently more pay for the additional duties involved in separating recyclable materials from the general garbage. His question was not out of line considering these new duties had never been a part of his normal routine, and would have required more time than what he had usually been scheduled to work. When Ms. Solano could not answer his question, she left to speak with her supervisor who had the authority to provide such an answer. Her return and response to his inquiry came in the form of a demand that he leave the premises. Any reasonable person would believe that the employer no longer desired to maintain an employment relationship with that employee.

871 IAC 24.1(113) provides:

> *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> *a. Layoffs*. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> *b. Quits*. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> *c. Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> *d. Other separations*. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The claimant denied that he quit his employment; rather, he argues that Ms. Solano terminated him after consulting with Mr. Cardenas. In addition, the fact that she not only told him to leave, she also directed him to turn in his keys (which he usually took home with him over the weekend) and turn in his ID badge, which is an item generally issued at the start of one's employment and only returned at the end of that employment. It was not unreasonable for the claimant to believe he was terminated based on the employer's own testimony that although Ms. Solano had no authority to fire him, she could do so after "…consulting with her supervisor…" who happened to be Mr. Cardenas. (Tr. 10) The employer failed to provide either Ms. Solano or Mr. Cardenas as witnesses to provide testimony or statements as to the incident that led to the claimant's separation. (Tr. 5) Thus, we attribute more weight to the claimant's firsthand testimony regarding the incident.

Based on this record, we conclude that it was the employer who initiated this separation. And in cases, where the separation occurs as the result of a discharge, the issue of misconduct must be established.

Mr. Rodriguez inquiry about additional hours and pay to perform extra duties now required of him is not misconduct. The employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated April 8, 2011 is **REVERSED**. The claimant voluntarily quit with good cause attributable to the employer. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

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.

Monique F. Kuester

AMG/lms