

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

LLOYD T ALLEN

Claimant,

and

IOWA WORKFORCE DEVELOPMENT

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HEARING NUMBER: 08B-UI-09582

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: 96.3(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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Lloyd T. Allen, worked for USA Staffing Inc./Labor World, IA beginning in July of 2007. (Tr. 5) The claimant had worked approximately 31 job assignments (Tr. 5) including his last assignment as a flagger with Cedar Falls Construction which began June 30, 2008 and ended on July 3, 2008. (Tr. 6, 11)

In October of 2007, the client who was Cedar Falls Construction at that time reported to the employer that Mr. Allen borrowed money for food and gas (\$60) from a site supervisor and took a very long time to pay it back. (Tr. 6-7, 13, 14) The employer counseled Mr. Allen saying "you're never to borrow money or any other thing from a client..." (Tr. 6-7, 14) The claimant responded that he didn't know that was a policy, but that he understood.

On February 18, 2008, the claimant was assigned to Reliable Lawn Care doing snow removal when he requested food from one of his co-workers because his blood sugar was low. (Tr. 7, 18) The client asked the employer not to send Mr. Allen for future assignments.

The claimant was on assignment as a flagger with Cedar Falls Construction, again. While on assignment and unable to leave his post on July 3rd, he asked the pilot car driver to get the food he had left in his motel room. (Tr. 12) One of his female co-workers overheard his request over the radio and brought him a snack. (Tr. 12) The following day was a holiday after which the claimant returned to USA Staffing to find out when he was scheduled to return to Cedar Falls Construction. The employer told him that "... the client was already gone..." (Tr. 15) Mr. Allen continued to call in as he was directed, but he was not given further assignments. (Tr. 15, 17)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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 establishes that Mr. Allen was employed with USA Staffing until he was no longer given future assignments as of July 3rd. (Tr. 17) According to the employer's unrefuted testimony, Mr. Allen had previously borrowed money from a client (Cedar Falls Construction) for which he was issued a verbal warning and counseling that such action was, essentially, a bad business practice. (Tr. 6-7, 8, 14)

Although the claimant admitted borrowing the money, he acknowledged his initial ignorance of the policy and complied with the employer's directive.

The record also reveals that the claimant was diabetic and sometimes experienced low blood sugar while on the job. He dealt with this health issue on a couple of occasions by requesting a snack on the job if he was unable to get away from his post. As to the second incident of his 'borrowing' from a client (Reliable Lawn Care), the claimant denied incident. In addition, the employer offered no evidence to support that the claimant was issued a second warning, much less told that his job was in jeopardy with regard to his alleged behavior at Reliable Lawn Care.

The final incident that triggered his termination involved the request of his own food that was not readily available for his immediate consumption. (Tr. 12) Mr. Allen's request, though seemingly inappropriate and made at an inopportune time was, at worst, poor judgment. While the employer may have compelling business 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).

The claimant had no knowledge that the July 3rd incident could result in his termination. His subsequent behavior after the holiday is indicative that he expected to return to work as usual. He had no reason to know, given the employer's response to him when he checked in, that he was terminated. He provided credible testimony that when he sought to report back to work, he was told "the guys had left that were going today..." (Tr. 13, lines 21-24) The employer, the claimant, as well as the claimant's witness testified that the claimant continued to call in for work which corroborated the claimant's testimony that he was not notified of his termination. We conclude that the employer failed to satisfy their burden of proving disqualifying misconduct.

DECISION:

The administrative law judge's decision dated November 10, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

AMG/ss

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/ss