**BEFORE THE**
**EMPLOYMENT APPEAL BOARD**
**Lucas State Office Building, 4TH Floor**
**Des Moines, Iowa 50319**
**eab.iowa.gov**

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| **DAVID EARLEYWINE** | : | |
| | : | **HEARING NUMBER:** 22B-UI-23011 |
| Claimant | : | |
| | : | |
| and | : | **EMPLOYMENT APPEAL BOARD** |
| | : | **DECISION** |
| **DON WYCKOFF HEATING INC** | : | |
| | : | |
| 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

**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. 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, David Earleywine, worked at Dan Wyckoff Heating, Inc. from November 19, 2012 through September 11, 2021 as a lead new construction installer. His immediate supervisor was Jesse Parker. The Employer has an attendance policy that required employees who were going to be absent or late, to call in. This policy was 'fairly liberal, i.e., employees could either call, leave a message or text their absence so long as it was before their shift started.

The Employer considered the Claimant a 'great' employee until the last couple months. The Claimant had been experiencing a few personal problems, which caused him to occasionally miss work unexpectedly, but he always informed the Employer about his absences.

On September 10, 2021, Mr. Parker texted him a message indicating he didn't know if he wanted the Claimant to show up for work the following day because the Claimant hadn't been getting enough work done. The Claimant immediately called his supervisor who told him that he didn't know if "it was going to work.," The Claimant responded that he intended to come to work and get things done, but if Parker didn't want him to work, he'd come in and collect his personal belongings. Parker then told him to call when he got in. When the Claimant arrived at work the next day at 7:00 a.m., he called his supervisor as previously requested, but got no answer. The Claimant tried again about 8:30 a.m., and they both discussed his work. The Employer asked him if he could complete a list of tasks (fit a furnace, pull gas lines, install Concentrix, and punch out back fans) within a day's work. The Claimant responded that he wouldn't be able to do everything within a day. The Employer told him he had to go.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2021) 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 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. We attribute more weight to the Claimant's version of events. The Claimant was a long-term employee (nine years) who had a good work history. Although the Employer argues the Claimant started having had attendance issues, the Employer failed to provide any firsthand testimony (supervisor, Jesse Parker) regarding these allegations, which the Claimant vehemently denied. In addition, there was no documentary evidence to support the Employer's allegations that these alleged attendance issues were such that his job was in jeopardy.

As for his work performance, the Employer told the Claimant he wasn't getting enough work done. He also admitted the Claimant was told to leave when the Claimant said he couldn't get Parkers' list completed within a day. It wasn't wholly unreasonable for the Claimant to understand he was being terminated on September 11th after making that statement. Based on these circumstances, we conclude it was the Employer who initiated this separation.

871 IAC 24.32(4) provides:

> *Report required*. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The Employer provided no evidence as to what particular act(s) or failure to act, dates, etc. the Claimant committed that would cause his termination, other than he wasn't doing enough, which alone is not sufficient. Unless the Employer can show a willful or wanton disregard of an employer's interest, i.e., repeated refusal to follow directives, or committed "…carelessness or negligence of such degree of recurrence as to manifest equal culpability…," See, 871 IAC 32.24(1)" a", supra, we cannot find misconduct has been established. For this reason, we conclude the Employer has failed to satisfy its burden of proof.

**DECISION:**

The administrative law judge's decision dated January 14, 2022 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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James M. Strohman

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Ashley R. Koopmans

**DISSENTING OPINION OF MYRON R. LINN:**

I respectfully dissent from the decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Myron R. Linn

AMG/fnv