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

NANCY J SZWARC	:	
	:	**HEARING NUMBER:** 16B-UI-05014
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
WALMART STORES 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: 96.5-2-A, 96.3-7

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 finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Nancy Szwarc (Claimant) worked for Wal-Mart (Employer), most recently as a full-time courtesy associate, from August 29, 1994 until she was fired on April 1, 2016.

The Employer had cash handling procedures that the Claimant saw earlier in her employment. On January 20, 2016, the Employer issued the Claimant a written warning for losing a check. This cost the Employer $1,100.00. The Employer notified the Claimant that further infractions could result in termination from employment.

On March 26, 2016, a customer cashed a check. The Claimant counted out an extra $100.00 to the customer. The Employer was short $100.00.

On April 1, 2016, the Employer terminated the Claimant for failure to secure the employer’s assets.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) 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).

The Employer has not proved that this is a case of a "deliberate act or omission". 871 IAC 24.32(1)(a). Since there was no intentional misconduct, disqualification could be justified only if the Claimant's error was "carelessness or negligence of such degree of recurrence as to manifest equal culpability…or to show an intentional and substantial disregard of the employer's interests." *Id.* "[M]ere negligence is not enough

to constitute misconduct." *Lee v. Employment Appeal Board,* 616 N.W.2d 661, 666 (Iowa 2000). When the issue is poor performance, what is required is "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board,* 616 NW2d 661, 668 (Iowa 2000). Where we are looking at an alleged pattern of negligence we consider the previous incidents when deciding if there is indeed a "degree of recurrence" that evidences the necessary culpability.

Here we do not find that the Employer has proven that the Claimant's pattern of errors rises to this level. The cash handling errors proven totaled two. This is the minimum number required for recurrence. Further the Claimant had these two errors, but had worked for the Employer for 22 years. It is true that the errors were over only three months, but in the context of the Claimant's long employment they were isolated. We have no reason to doubt that the Claimant was working to the best of her ability. The Employer acknowledged that the position was fast paced with a lot of room for error and that the Claimant may have had some problems keeping up with the work. The rule is that the Claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). Mere incapacity is also not misconduct. *Newman v. IDJS,* 351 N.W2d 806 (Iowa 1984); *Richers v. Iowa Department of Job Service*, 479 N.W.2d 308 (Iowa 1991). We find that incapacity or ordinary negligence is all that is proven here.

The Board understands that accurate handling of money is extremely important to the Employer. The issue, however, is not the importance of the policy the Claimant violated. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed misconduct. 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. *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552, 554 (Iowa App. 1986); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983); *Newman v. Iowa Dept. of Job Service*, 351 N.W.2d 806, 808 (Iowa App. 1984). We conclude that misconduct was not shown and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated May 16, 2016 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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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv