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

TACE M CLARKE Claimant and **FRAUENSHUH HOSPITALITY GRP OF MN** Employer	:	**HEARING NUMBER:** 17BUI-12323 **EMPLOYMENT APPEAL BOARD DECISION**

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:

The Administrative Law Judge's findings of fact are adopted by the Board as its own.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) 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 Claimant in this matter is guilty of no more than "good faith errors in judgment" in a single instance. 871 IAC 24.32(1)(a). Such good faith instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App.1986); 871 IAC 24.32(1)(a). The Claimant was having child care issues and given the importance of the inspection she came to work. She could have called in absent, but instead she brought her child to work with her. She had done this once before, with permission, and so it was clearly not a *per se* infraction merely to have a child with you at work on an emergency basis. Where she went most astray was with taking the child behind the counter, even though on her back. This was a violation of work rules, but the question is whether it is also a willful and wanton disregard of the Employer's interests.

On the day in question the Claimant was juggling a day care exigency, an infant, and her work duties. This no doubt led to her poor choice. But being stressed or distracted, and making a good faith error in judgment – and this undoubtedly was both an error and in good faith – does

not constitute misconduct. *E.g. Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308 (Iowa 1991) (Claimant faced "several management problems of great magnitude" and that "the fact that she did not recognize the trust deposit problems to be of greater importance to her employer…does not prove misconduct."). Even the case of *Flesher v. IDJS*, 372 N.W.2d 230 (Iowa 1985), which denied benefits, supports our conclusion. In *Flesher*, as in this case, an employee

failed to follow an important procedure of the employer. The Court noted that "[w]hile the definition of misconduct does not specifically address an employee violating security procedures, we conclude that such a violation without dishonesty may be deemed misconduct." *Flesher* at 234. In so ruling the Court was careful to explain that "[r]epeated violations of a security rule, depending upon the effect on the employer and employer reaction to a knowing violation, **may** indicate that employee actions are **more than** ordinary negligence and, rather, represent a substantial disregard of the employer's interest." *Flesher* at 234 (emphasis added). In affirming the Board the Court found that a reasonable fact finder could find that the final act was not "due to oversight **or lapse of judgment**." *Flesher* at 234(emphasis added). The Claimant here, unlike the one in *Flesher*, has not been shown to be guilty of repeated negligence of sufficient magnitude as to be equally culpable to intentional misconduct, nor of a willful decision to disregard policy, but only a "lapse of judgment." Such lapses are not disqualifying.

The Board understands that "nobody in/nobody out" policy is important to the Employer. Yet it is common for actions that are not misconduct to nevertheless implicate important policies. For example, drivers of commercial vehicles have specific requirements on the time and manner of driving imposed on them by law. 49 CFR 383. This does not mean drivers who are engage in ordinary negligence, in violation of the rules of the road, commit misconduct. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000); *Fairfield Toyota, Inc. v. Bruegge*, 449 N.W.2d 395 (Iowa App. 1989). Food service workers must handle food, dress, use the restroom, etc. as prescribed the Food Safety Code. Iowa Code §137F.2 (adopting 1997 food code for all Iowa food establishments). This does not mean a food service worker who forgets to wear a hairnet commits misconduct because just because it is a violation of a regulation. Nurses must administer medications according to the licensing standards of their profession and of whatever facility they may be working in. 655 Iowa Admin. Code 4.6 (nursing standards); 481 IAC 58 (skilled nursing facility); 481 IAC 57 (residential care facility); 481 IAC 51.7(hospital). This does not make poor judgment in rendering care, in violation of governing regulations, into misconduct. *Infante v. Iowa Dept. of Job Service*, 364 N.W.2d 262, 265 (Iowa App. 1984). Construction and manufacturing workers are expected to comply with very important OSHA safety regulations yet their violation of those standards does not automatically mean they are disqualified. Servers should not sell beer to a minor, but a single lapse in memory resulting in a failure to card would not normally be misconduct. The Board's point is that many employees may engage in isolated acts of negligence, unsatisfactory conduct, or poor judgment that violates some policy, rule, or regulation. This fact alone does not convert a single negligent act, or a single good faith error of judgment into misconduct. The key is the nature of the conduct alleged to be disqualifying – not just the importance of the policy at issue. In other words, "[m]isconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.* 616 N.W.2d 661, 665 (Iowa 2000); *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct.App.1995); *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *Breithaupt v. Employment Appeal Bd.,* 453 N.W.2d 532, 535 (Iowa Ct.App.1990); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219, 222 (Iowa App. 1983). This case falls within that rule. We understand why the Claimant was discharged but do not find that the Employer has proven this reason sufficient to disqualify the

Claimant.

DECISION:

The administrative law judge's decision dated December 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv