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

FRANK LEONETTI	:	
	:	**HEARING NUMBER:** 10B-UI-06280
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
TIMBERLAND PARTNERS MGMT CO	:	
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

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, Frank Leonetti, was employed by Timberland Partners Mgmt., Co. from May 19, 2008 through March 23, 2010 as a full-time maintenance technician. (Tr. 3-4, 16-17) The employer provided the claimant was an employee handbook for which he signed in acknowledgement of receipt on May 19, 2008. (Tr. 4-5, 7, 26, Employer's Exhibit 1) A portion of those policies provides "…The company will…maintain an environment that encourages every employee to be honest and fair with regard to the conduct of their work…if you have any doubts about the nature or result of any action…consult your supervisor immediately…" (Tr.25, Employer's Exhibit 1-unnumbered p. 1) The handbook also sets forth that termination may result if there is any "… [f]alsification through misrepresentation or omission…to Timberland Partners…documented or verbal representation of Timberland Partners operations…" (Tr. 5, Employer's Exhibit 1-unnumbered p. 1)

On November 25, 2009 (the eve of Thanksgiving), Mr. Leonetti received a call to the Johnson apartment where he discovered that the hot water line located beneath the vanity in the bathroom had burst and 180-degree water was flowing everywhere. (Tr. 10, 18) The claimant, who'd become friends with the Johnsons (Tr. 23-24), shut off the supply line and immediately contacted his district supervisor (Bill Armstrong). (Tr. 18, 27-28, 29) This break had thoroughly soaked the carpet, and left standing water throughout the apartment. (Tr. 10, 18) The claimant and another technician (Eric Poole) used the apartment complex's only standard shop-vac to extract water from the carpet. (Tr. 18-19, 23, 27-28) This process took the claimant approximately 4 and ½ hours, and the carpets were still soaked. (Tr. 19, 27) Mr. Leonetti suggested that they roll up the carpet and remove it so that they could "…extract the water properly…" (Tr. 19) The employer remarked that it would be too costly. (Tr. 19, 27-28) One of the supervisors told Mr. Johnson that someone would be there the next day (Thanksgiving) to replace the carpet. (Tr. 19) Bill also instructed the Johnsons to remove everything from the two bedrooms so that the carpet could be rolled back. (Tr. 20) The carpet was never rolled back; instead, a carpet company came the day after Thanksgiving to extract more water, disinfect the carpet, and set up two dehumidifiers, which the latter "…kept tripping the breakers as the shop-vac did…" (Tr. 20, 28)

The following Monday, the entire floor where the Johnsons lived smelled of mold and mildew. (Tr. 20) Mr. Leonetti told Mrs. Johnson that the employer would "…place them in a vacant unit…", as the employer had done with other tenants involving other emergency circumstances. (Tr. 9, 22-23, 33, Employer's Exhibit 2) The claimant contacted Bill Armstrong and AJ, (immediate supervisor who was out of town) who told him the Johnsons could move into the model unit. (Tr. 22, 36) However, to the claimant's surprise, Sharon Barson (office manager) (Tr. 28, 32) told him that there were no other vacancies, as the model unit was already rented. (Tr. 9, 22, 35, Employer's Exhibit 2) The Johnsons moved out of the complex and into their own home, which they had already been in the process of relocating when the hot water line broke. (Tr. 20) Many of the boxes they had packed were ruined because of the molding and the claimant offered to clean up this mess by throwing these items out when they moved from the premises. (Tr. 21, 34)

Around the first week of February (Tr. 17, 21), the Johnsons presented Mr. Leonetti with a letter, which described what happened the evening of November 25th. (Tr. 17, 22, 33) The Johnsons lost their deposit and the employer was trying to recover $1,800 for the carpet that was damaged by the hot water line break. (Tr. 21, 23) The employer and the tenants were involved in a lawsuit, as the Johnsons sought to recover "…for [the] loss of household goods…" (Tr. 5, 14, 36) Mr. Leonetti was not sure if he should sign the letter. So he attempted to contact his district supervisor who wasn't available; and then the night supervisor who was on vacation to seek their advice. (Tr. 25) He believed it was okay to sign the letter since it was only a factual account of "…what happened that night…" (Tr. 17, 34, 39) and he felt it was the right thing to do (Tr. 22), as he was "…being honest… [and] fair to the residents…" in accordance with company policy. (Tr. 25, 30, Employer's Exhibit 1-unnumbered p. 1)

Later that night, Bill Armstrong and Sherry Barson approached the claimant about the letter, which Mr. Leonetti initially denied. As he walked out the door, he turned, "…walked right back in… [admitted that he] did not write the letter, but [he] signed [it] because it stated the facts of that night." (Tr. 4, 17-18, 26, 28) The employer subsequently had the claimant sign another document that was notarized, which indicated that Leonetti did not write the Johnson letter that was used in the Small Claims proceeding on March 18th. (Tr. 6) This document facilitated the court's overturning its original decision that was in the

tenants' favor. (Tr. 6) The employer then terminated Mr. Leonetti for "…violating company policy regarding falsification and misrepresentation of the company…" (Tr. 4, Employer's Exhibit 1) The claimant had a good work record and had never been reprimanded in the past for such an infraction. (Tr. 24, 31-32)

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:
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> 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 employer's principal argument that the claimant 'overstepped his boundaries' (Tr. 14, 15) or went 'beyond the scope of his responsibilities' (Tr. 9, 11) is not the equivalent of making a misrepresentation or falsification within the meaning of the employer's policy. (Tr. 15) First off, the very definitions of falsification and misrepresentation are not all that dissimilar. Falsification entails distortion of the truth, "an act to prove or declare false…telling lies…misrepresent…" See, Webster's Seventh New Collegiate Dictionary, Third Edition, Copyright 1972. Misrepresentation means the "… act of [giving] a false or misleading misrepresentation… or to serve badly or improperly as a representative of…" See also, Webster's Dictionary.

Here, the record clearly establishes that Mr. Leonetti merely informed the Johnsons of what was normal protocol in the face of emergencies at the complex, i.e., the tenants would be moved to another unit. (Tr. 9, 22-23, 33, Employer's Exhibit 2) The employer does not dispute that this was the general procedure for emergency circumstances. Additionally, the record establishes that *before* Leonetti actually told the Johnsons they *could* move, he properly sought authorization to allow the 'waterlogged' tenants to move to a vacant unit to which he was advised by A.J. (another supervisor) that it was okay to give them a furnished model unit. (Tr. 22, 36) Thus, there was clearly no misrepresentation or 'overstepping his boundaries' in giving the Johnsons the 'go ahead' to take the model unit. The fact that the claimant had to quickly retract his statement after the office manager (Sharon Barson) called him back to inform him that the model unit had already been rented (Tr. 28, 32), does not detract from the veracity of his previous statements to the tenants.

As for Mr. Leonetti's signing of the tenants' letter, he initially avoided admitting anything to do with the letter. However, after a few seconds, he admitted to the employer that he signed it, albeit he denied being its author. (Tr. 17-18, 26, 28) Thus, there was no falsification here. The claimant provided a reasonable explanation as to why he believed he was doing nothing wrong, as the letter, in his eyes, was the truth of what transpired on November 25th. All he did was concur that the contents of the letter accurately represented what he saw that night and in the days that followed. (Tr. 17, 34, 39) Although Leonetti was somewhat concerned about his relationship with the employer, he acted in good faith in keeping with what he believed was the employer's policy regarding honesty and fairness to the tenants. (Tr. 25, 30, Employer's Exhibit 1-unnumbered p. 1) We would note that prior to his actual signing, Mr. Leonetti did attempt to contact his superiors for advice, however, neither supervisors was available for discussion of the matter. So he relied on his own sense of what was right and wrong to sign the letter.

The employer argues that by placing 'maintenance tech' after his signature Leonetti misrepresented the company as it essentially concedes fault on the employer's part, which the employer denies any shortcoming in handling the Johnson matter, much less that the claimant had authority to speak on its behalf. (Tr. 4-5, 41) However, given Leonetti's unrefuted and seemingly unblemished work history (Tr. 24, 31-32), we find the signing of his name with his position, alone, does not rise to the legal definition of misconduct, even if the consequences of that signature did not (initially) bear out favorably for the employer. At worst, it was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. The employer provided no firsthand witnesses to refute any of the claimant's testimony, and we would attribute more weight to the claimant's version of events.

In the end, the employer discharged the claimant, essentially, for signing off on statements that were used in a court proceeding that were not the in the employer's best interests, and of which the employer obviously preferred the claimant to be silent. The court in Fitzgerald v. Salsbury Chemical, 613 N.W.2d 275 (Iowa 2000) involved a wrongful termination suit in which the court addressed the "dual claim that the employee was discharged because he did not support his employer's decision to terminate another employee and the employer feared that he intended to testify on behalf the other employee in a potential lawsuit." Fitzgerald slip op. at 1. The court refused to find general protection for the employee who did not support his employer's decision to terminate a co-worker event though it was alleged that the decision was based on illegal retaliatory motives. The court was unwilling to extend the Civil Rights Act's protection for "obeying" its provisions to the tort setting. The court did, however, find protection for the giving of truthful testimony. This protection extended to the plaintiff's good faith intent to so testify. "In this case, if Salsbury was motivated to dismiss Fitzgerald because he intended to testify truthfully in a future lawsuit, a dismissal would have a chilling effect on other employees by discouraging them from engaging in similar conduct." Fitzgerald. Such a dismissal would therefore endanger the policy against perjury and would be illegal.

In the instant case, we find the employer's motivation for terminating Leonetti analogous to the employer's motivation in the Fitzgerald case. Just as the court there found protection for Fitzgerald's giving of truthful testimony, we too find that Leonetti's action should be protected in so far as he should not be disqualified for being honest and truthful, even though it was contrary to the employer's position. Based on the foregoing reasoning, we conclude that the employer failed to satisfy their burden of proving their case.

DECISION:

The administrative law judge's decision dated June 16, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is denied benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

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.

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Monique F. Kuester

AMG/fnv