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

GEBRIEL H AHMED	:	
	:	**HEARING NUMBER:** 12B-UI-00220
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
SWIFT PORK COMPANY	:	
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 DENIED

The Employer appealed this case to the Employment Appeal Board. Two 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 Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact with the following modification:

The Claimant began his employment on November 1, 2010. (Tr. 3)

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:
>
> 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).

While we acknowledge the burden of proof lies with the Employer to prove misconduct, and that the Employer did not present any firsthand witness to the incident, we are also mindful of the fact that the only evidence in the record is the Employer's hearsay evidence. Hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency. (Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995) And whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which

reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982).

In this case, the Employer presented evidence from his assistant's notes that documented the October 25th incident as it was reported to the assistant immediately after it occurred. (Tr. 4) The Claimant's reported behavior ("…flipped off…middle finger…") (Tr. 4) in response to his supervisor's reasonable request for him to return to his workstation is a universally recognized gesture having negative connotations. Its symbolism connotes the user's disrespect, disregard, and/or disdain for whatever of whomever target the gesture is directed. When the Claimant made the gesture to his supervisor, his behavior was clearly an act of insubordination. To compound the matter, it took yet another supervisor to reiterate the first supervisor's directive that he return to his area. The Claimant did not immediately comply with these directives, which further served to undermine these supervisors' authority in the workplace. Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

Mr. Ahmed failed to participate in the hearing to refute the allegations raised against him. We find the Employer's account of the incident more credible than not that it happened. And whether the Claimant had good reason to not to obey two directives that he return to his area, and react the way he did is unknown, and irrelevant. An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the Employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985). It was not unreasonable for the Employer to expect employees to stay and work at their own workstations during work time. Surely, the Claimant had been employed in this environment long enough to know what was expected of him, and that his refusals and subsequent hand gestures were insubordinate.

"In order to be disqualified from benefits for a single incident of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the Employer has a right to expect of employees." Diggs v. Employment Appeal Board, 478 N.W.2d 432, 434 Iowa App. 1991) (citing Henry, 391 N.W.2d at 736). Further, "[w]illfull misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his Employer." Pierce v. Iowa Department of Job Service, 425 N.W.2d 679, 680 (Iowa 1988) (citing Myers, 373 N.W.2d 507, 510(Iowa App. 1985). We cannot know if Mr. Ahmed had good reason not to immediately return to his workplace, but what is certain 'flipping off' your supervisors is never by any reasonable person's standard an appropriate response to an Employer's directive. The Employer has a right to expect civility among its employees and particularly toward those persons in positions of authority whose responsibility is, in part, to ensure safety and efficient operations in the workplace. Based on this record, we conclude that the Employer satisfied their burden of proof. Benefits should be denied.

DECISION:

The administrative law judge's decision dated February 7, 2012 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying reasons. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Lastly, the Claimant also appealed the administrative law judge's decision, which favored the Claimant. We note that the Claimant was not an aggrieved party at that time.

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John A. Peno

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Monique F. Kuester

AMG/fnv