

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

KARL R GILBERT

Claimant,

and

ALL CLEAN OF IOWA INC

Employer.

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HEARING NUMBER: 14B-UI-08597

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

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 Claimant, Karl R. Gilbert, worked for All Clean of Iowa, Inc. from October 8, 2013 through July 24, 2014 as a full-time hood cleaner. (5:15; 5:21; 5:32-5:36; 5:51) The Employer does not have a policy handbook. (10:31) The Claimant had an ongoing issue with tardiness for which the Employer issued numerous warnings and 10 write-ups to him. (10:41; 13:35) The Employer issued 2 written warnings for tardiness (November 20, 2013 and May 28, 2014) that specifically warned him that any further infractions could result in termination. (11:12-11:56; Exhibit 1-unnumbered pp. 6 & 9)

On July 11, 2014, the Claimant recorded that he arrived at the shop at 6:30 p.m. and got to Polk County Jail at 7:00 p.m. (6:18-8:09; 9:08; 26:00; 26:53) Mr. Gilbert also recorded that he left the jail and got back to the shop by 9:15 p.m. (8:16) He had not documented and obtained a signature on his work order to verify the time he arrived and left the jail, as required. (37:10-37:35) The Employer later learned on July 23, 2014 (10:54) from the jail Engineer via an e-mail that the Claimant was actually 2 hours late that day, i.e., 8:45 p.m. (8:17-9:07; 9:27-9:42; Exhibit 1, unnumbered pp. 3-5) The Employer ended up losing the account because of the Claimant's recurrent tardiness. (9:42) Mr. Gilbert was terminated for falsifying records.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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 Employer's version of events. The record establishes that Mr. Gilbert was habitually tardy and received numerous warnings, both verbal and written, which he did not dispute. The last warning he received on May 28, 2014 put him on notice that any future infraction could result in termination. Although the Claimant denied that he was late in arriving at the jail on July 11, 2014, the Employer's testimony that the Claimant had a history of being late tends to corroborate that it was more probable than not that Mr. Gilbert was, again, late as usual and falsified his work report, again, to hide his tardiness. (9:27) The Employer provided documentation to support their allegation that the Claimant falsified his work order to cover-up being late, which ultimately cost the Employer his account with the Polk County Jail. It is clear from this record that the Claimant's behavior was repeated acts of "...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 or of the employee's duties and obligations to the employer..." See, 817 IAC 24.32(1)"a". For this reason, we conclude that the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated September 10, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. 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".

A portion of the Employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

Kim D. Schmett

Ashley R. Koopmans

AMG/ss

DATED AND MAILED: _____

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