

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

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**RAMIRO C CASTRO**

Claimant,

and

**BOB MALLOY SODDING CO**

Employer.

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**HEARING NUMBER: 14B-UI-13119**

**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 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, Ramiro Castro, worked for Bob Malloy Sodding Co. as a full-time finish grader until September 9, 2014. (13:33-14:35; 33:13-33:25) At the beginning of his employment, the Claimant told the Employer he couldn't work on weekends because he had to care for his children since his wife worked part-time on weekends. (18:19-18:28; 23:44-24:00; 24:56-25:00; 29:56-30:02; 37:30-37:37)

During the week of September 1<sup>st</sup>, 2014, the Employer lost a job on which the Claimant was working, which caused the Claimant to have fewer hours. (34:17-34:29) Mr. Castro requested more hours because he had three children to provide for; but the Employer indicated he didn't have additional work available. (27:57-28:47; 29:53-29:58; 35:00-35:15) The Claimant asked him if he could supplement his income with unemployment benefits to which the Employer became upset telling him he was not going to lay him off; he would just fire him. (28:30-28:34; 34:38; 35:14-35:36)

The Employer then offered to try to find him more hours until he could find another job. (29:35-29:39) The Claimant did not hear from Mr. Malloy about any additional work. (27:44-27:46; 30:05-30:15; 30:25-30:37) Mr. Castro found another job on Tuesday or Wednesday of the first week in September of 2104, but didn't start working the new job until the following Saturday, September 6, 2014. (30:43-30:51; 31:10-31:40) When the Employer learned of the Claimant's new job, he demanded that he work for him that Saturday to which the Claimant refused because he was not scheduled to work with Malloy. The Employer (14:51-14:57) terminated him for refusing to work. (15:05-17:25; 33:18-33:26) The Claimant never received any warning for failing to follow the Employer's directive. (19:00-19:36)

## **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 Claimant's version of events. The Employer's case rests primarily on hearsay evidence. While 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), 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). The entire record must be examined to see if it rises to the necessary levels of trustworthy credibility and accuracy to meet the "reasonably prudent person" criteria. Schmitz v. Iowa Dept. of Human Services, 461 N.W.2d 603 (Iowa App. 1990)

In the instant case, Mr. Malloy failed to participate in the hearing to provide any firsthand testimony as to the events that led to the Claimant's termination. The Claimant, on the other hand, provided credible, unrefuted firsthand testimony that his hours were reduced through no fault of his own. For that reason, his need for additional hours (hence more pay), which the Employer was unable to provide, led him to seek additional employment. The fact that he ended up working on a Saturday with this new employer when he had previously told Malloy that he couldn't work on Saturdays, is not commensurate with refusing a directive to work. First off, both parties' testimonies establishes that it was a known fact that Mr. Castro didn't work Saturdays and the reasons why. Secondly, the Claimant denied ever receiving any notification that he was required to work Saturday, September 6<sup>th</sup>, 2014. It seems highly unlikely, given Castro's need for more work, that he would have turned Malloy down had additional work been presented to him. Thirdly, the Claimant cannot be faulted for finding extra employment to supplement his income when the Employer made it clear he had none. Based on this record, we conclude that the Employer failed to satisfy its burden of proof.

#### **DECISION:**

The administrative law judge's decision dated January 20, 2015 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided he is otherwise eligible.

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Ashley R. Koopmans

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James M. Strohman

**DISSENTING OPINION OF KIM D. SCHMETT:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the administrative law judge's decision in its entirety.

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Kim D. Schmett

AMG/ss