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

DAWN COFFMAN

Claimant,

and

CASEY'S MARKETING CO

Employer.

HEARING NUMBER: 08B-UI-08873

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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Dawn Coffman (Claimant) was employed by Casey's Marketing (Employer) as a full-time manager from July 23, 2004 until the date of her discharge on September 2, 2008. (Tran at p. 2-3; p. 8-9; Ex. 1, p. 3). The Employer received an email complaint about the Claimant on January 24, 2008 and issued the Claimant a verbal warning. (Tran at p. 4). The email complained that the Claimant was rude to customers and employees alike. (Tran at p. 5). A written warning was issued to her on April 22, 2008 after the Employer found a note the Claimant had left for her employees to read. (Tran at p. 3; Ex. 1). The Claimant was advised to act professionally and to communicate with her employees in a professional way. (Ex. 1, p. 1). A second written warning was issued to the Claimant on August 20, 2008 in response to another email complaint that the Claimant is rude to both employees and Employers. (Tran at p. 4-5; Ex. 1, p. 2). The warning advised her that no more rude or unprofessional behavior would be tolerated. (Ex. 1, p. 2). A final email complaint was received on August 28, 2008. (Tran at p. 6-7; Ex. 1, p. 3). This e-mail alleged that the Claimant was rude and unprofessional. (Tran at p. 6-7; Ex. 1, p. 3). At approximately the same time, the employer received several complaints from employees who were upset about not getting guidance from the claimant and who claimed they were threatened with dismissal for various reasons. (Tran at p. 7-8).

The Claimant was discharged on September 2, 2008 for the stated reason of being rude and unprofessional. (Tran at p. 3; Ex. 1). Had the Employer not received the third e-mail it would not have discharged the Claimant. (Tran at p. 3; p. 9).

We note that although the Administrative Law Judge's decision refers to an Exhibit 2 this appears to be a typographical error. No such exhibit was offered or received into evidence.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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.

"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).

Characterization of conduct as "rude" and "unprofessional" is exactly that, a characterization. It's the speaker's own conclusion. It is not a description of what the person did that the speaker believes to be rude. We disqualify claimants for what they did, not what others thought about what they did. We therefore need more than just the bare assertion that the Claimant here was rude. We need to focus on: what did she do that was perceived as rude?

The first allegation of rudeness was in an e-mail that referred to the store employees generally. According to this e-mail the only thing the Claimant did personally was that she apparently carried on a conversation with a subordinate rather than with the customer. (Tran at p. 5). We do not know how often the Claimant is alleged to have done this, nor do we know what the conversation in question was about. Certainly a manager can be justified in speaking to a subordinate about important business rather than a customer. We cannot conclude based on this e-mail that the Claimant was in fact rude to customers.

The e-mail of August 19 asserts, in conclusory terms, that the Claimant is a "b-tch" and "very mean." As proof it asserts only that she tells her employees to do work or else they will get written up. This e-mail is anonymous. We have some trouble, in general, finding that a supervisor who insists on work from her subordinates is being "very mean." Of course, style counts but the anonymous e-mail leaves us clueless on why the Claimant was called "b-tch" and "very mean." Frankly, this sort of venting is so easily explained by many factors other than the Claimant actually being "very mean" we give it very little weight. We must also note that the first two e-mails are inconsistent. One asserts that the employees get away with anything and that the Claimant is too friendly with them, rather than the customers. The other asserts that the Claimant is too hard on her employees. We cannot conclude based on the second e-mail that the Claimant was in fact "very mean" to her subordinates, or that she acted in a way deserving of the epithet used.

The Employer asserts a "nasty" note left by the Claimant. What did the note say? Apparently it said something about employees reading items on the Claimant's desk. What made this note "nasty?" We do not know. We know only that the Employer thought it was nasty. The Employer is entitled to its opinion but we are also entitled to ours. Without at least a description of what was inappropriate about the note we cannot rationally form an opinion about the note and so cannot conclude that the Claimant in fact actually left a "nasty" note.

The final e-mail does not give the name of the reporter but it appears to be from a mother-in-law of one the Claimant's subordinates. This e-mail alleges many horrible things done by the Claimant including drug use on the premises, leaving the premises while on the clock, humiliating her employees, never working on weekend even though clocked in, and writing up employees to drive them out. (Tran at p. 6-7). The e-mail also alleges "Dawn has been covered up by her immediate supervisor due to their longtime friendship." (Tran at p. 7). The Claimant's immediate supervisor, however, testified at hearing and denied a cover-up, stated they have no long-term relationship, and that they are not friends. (Tran at p. 7). The Employer did not investigate the allegations of this e-mail. No evidence other than this e-mail was offered to show that the Claimant actually did drugs or defrauded the employer over the time clock. As for rudeness and humiliation the e-mail, again, fails to identify what the Claimant actually did. What did she say or do, to whom, in what manner, and in what context? We do not know. Whom did she write up, when, for what, in order to drive them out? We do not know. Could the second e-mail be from an employee angry over justified discipline and the third from her mother-in-law? This is certainly possible. What has the Employer given us so that we may weigh this, and many many alterative explanations, against the Employer's conclusion that the Claimant did what was alleged? Nothing at all. We cannot conclude based on the third e-mail, or on all three together, that the Claimant was in fact rude and unprofessional.

With the minor exception we discussed above (conversation with subordinate rather than customer) the incidents of asserted rudeness have not even been described to us. As far as the rudeness is concerned, this is one of those rare cases that fall under rule 871-24.32(4):

> Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established.

The Employer gives us little more than an allegation of misconduct. The Claimant counters with statements that she was not rude. Meanwhile allegations of drug use and time clock fraud the Employer does not even attempt to corroborate and may be, like the alleged cover-up which even the Employer denies, wildly inaccurate. We understand that the Employer feels justified in its termination, and it may very well be. But we reach conclusions based on evidence and the Employer has simply not given us the sort of details about what the Claimant actually did that could justify a finding in its favor. We cannot find that the Employer has carried its burden of proving that the Claimant actually engaged in disqualifying misconduct.

DECISION:

The administrative law judge's decision dated October 21, 2008 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.

John A. Peno

RRA/fnv

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE 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 Kuester

RRA/fnv