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

DEANNA K VAUBLE	:	
	:	**HEARING NUMBER:** 10B-UI-09137
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
ST ANTHONY REGIONAL HOSPITAL	:	
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: 96.5-2A

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, Deanna K. Vauble, was employed by St. Antony Regional Hospital from March 17, 2008 (as corrected from previous decision) through May 13, 2010 as a full-time certified nursing assistant (CNA). (Tr. 2-3, 14-15) The employer received reports from other employees and residents that the claimant was 'rough and rude' to the residents and had an attitude with her peers for which the employer verbally discussed their concerns with her. (Tr. 11)

On October 23, 2009, the employer issued the claimant's first written warning after receiving a report that Ms. Vauble was being negative and complaining about being short-staffed in the presence of residents. (Tr. 4, 11, 2-, 23) The claimant was very stressed on the job because of the limited staff, which resulted in the difficulty tending to the patients in a timely manner. (Tr. 18-19) She would sometimes receive

reprimands from "…people in the office and social workers …for nor answering so many lights in a timely manner…" (Tr. 19) The claimant soon thereafter posted a note on the break room board apologizing for allowing her personal life to affect her at work. (Tr. 20-21, 23) The employer suggested that she partake in the Employee Assistance Program (EAP). (Tr. 11-12, 14, 18)

Ms. Vauble received a second written warning on November 16, 2009 and suspended for three days for roughly handling a resident when drying the resident after a bath; the claimant caused her hemorrhoids to bleed. (Tr.5, 9, 10, 13) The resident's daughter complained to the employer and threatened to contact Department of Inspections and Appeals, but instead directed the employer never to allow the claimant to care for her mother – the resident. (Tr. 10)

On March 11th, 2010, two co-workers reported that Ms. Vauble had been "…frequently impatient, loud, and rude with residents," namely one resident whom the claimant refused to place a hairnet over her head after the resident requested her to do so. (Tr. 4, 12-13, 16-17) The claimant had been instructed by the family of this resident "…make sure [the resident] didn't get a hold of [the hairnet]…take it away because she was losing them…on a daily basis…" (Tr. 17) The employer conducted an investigation into the matter and terminated the claimant on May 13, 2010. (Tr. 4)

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).

The employer's argument that Ms. Vauble had a history of being rough, rude and impatient with not only her co-workers, but with the residents as well is not supported by substantial evidence in the record. First off, the employer failed to provide firsthand witnesses to any specific incident, and fell short of providing details beyond vague descriptions of how the claimant allegedly demonstrated unacceptable conduct toward residents and co-workers.

As to the first incident (October 23rd, 2009), Ms. Vauble admitted to sometimes having an attitude in the workplace, as she felt a lot of pressure to perform her job duties while being short-staffed, which inevitably resulted in late responses to call lights. This circumstance gave rise to some reprimands, which the claimant tried to the best of her ability to fulfill her responsibilities under said working conditions. Her choice to deny the employer's offer of EAP was not wholly unreasonable in light of her denial that it was *not* personal issues that affected her work; rather, the limited resources with which she had to work. (Tr. 18)

The second incident (November 16, 2009) is largely unsubstantiated; the claimant neither admits nor denies this incident. As for the final act, the claimant denied being impatient and rude with the resident. She provided credible testimony that it was the resident's family who mandated that hairnets be limited, as this resident had the habit of losing them. (Tr. 17) Ms. Vauble's refusal to place one on the resident's head was in accordance with the family's instructions, which the CNA's are expected to adhere. The claimant was not the only caregiver to take hairnets away. (Tr. 17) And even though the employer refutes this testimony, again, the employer failed to produce or disclose these witnesses to the claimant so that they could either refute her testimony, or she could cross-examine them. (Tr. 19) We conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated August 13, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided she 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

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 (documents) 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.

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/fnv