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

KRISTEN E LINDHOLM	:	
	:	**HEARING NUMBER:** 13B-UI-13399
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
ALLEN MEMORIAL 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: 96.5-2-A, 96.3-7

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, Kristen E. Lindholm, worked for Allen Memorial Hospital from February 21, 2011 through October 4, 2012 as a full-time ER staff RN. (44:16) Her immediate supervisor was Sheila Markham (ER department nurse manager). The employer received complaints from emergency room (ER) personnel (Ron Schlatler, Sarah Davis, Cassie McBride & Tracy Sorenson) regarding the claimant's comments about sexual encounters she had with several individuals, showing off a recent body tattoo and other inappropriate behaviors.

Ms. Sorenson submitted a memorandum (27:41, 20:51) to Ms. Markham complaining that the claimant had been making inappropriate comments, which triggered an investigation into the matter. The employer confronted the claimant about the complaints to which she admitted showing her tattoo and bruises in response to Ms. Sorenson and Ms. Davis' requests to see them. (17:21-15:53; 00:48) The claimant had recently gotten a tattoo over her hip bone that was visible just above her pant line, which she showed her co-workers who wanted to see it. On another occasion, one of these women noticed some bruising on her arm and inquired about it, to which the claimant responded that it was due to an accident over the weekend that they didn't want to hear about. She only talked about her weekend after one of the women inquired about it. Ms. Lindholm's supervisor, Ms. Markham, was not present during these incidents. (23:50-23:39)

The claimant was surprised at the complaints, as she considered these women to be not only co-workers, but friends whom she confided in at the nurse's station on occasion. Prior to the investigation, no one had ever told the claimant her conversations were offensive.

The employer has a zero tolerance policy for harassment, i.e., creation of a hostile or intimidating environment that includes verbal or physical conduct that is persistent and also part of the Code of Conduct. Although the policy is posted and updated by e-mail, the employer never explained its harassment policy or what constitutes the definition of a hostile work environment to Ms. Lindholm. (31:34-30:18) The employer terminated the claimant that same day for creating a hostile work environment in violation of company policy.

Although the claimant was terminated on October 4th, the employer continued its investigation and received complaints on November 20th, 21st and the 28th. (39:16-39:09; 37:30-37:09; 29:34-28:56) In interrogatories submitted to the employer on behalf of the claimant, no one was named as having filed a complaint; and specifically, Ms. Davis indicated that the claimant did ***not*** create a hostile work environment. (39:35-39:18; 36:05-34:35)

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 claimant testified that she did not believe she created a hostile work environment, and she never received any indication from her co-workers that she was offending them. Ms. Lindholm provided credible testimony that she merely responded to questions about her weekend in which she acquired bruises that her charge nurses, who were also her friends, asked about. She also showed them her tattoo upon their request. The claimant had no reason to believe her comments under these circumstances were offensive in light of the fact that her superior induced her to talk about both subjects. Although we believe Ms. Lindholm may have acted inappropriately in some instances, she denied discussing the details of her bruises with anyone.

The record is void of any documentation to corroborate the employer's allegations other than the claimant's admission in which she provided cogent explanations for how her actions came about.

There are no verbal or written warnings in the record to show that the claimant was ever on notice that her job could be in jeopardy because of her conversations that she reasonably believed she had at the request of her 'supposed' friends at work. The employer failed to provide any firsthand witnesses to any of the incidents complained about. Thus, we attribute more weight to the claimant's version of events. Based on this record, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated March 18, 2013 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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Cloyd (Robby) Robinson

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

The employer submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence (document attached to the argument) which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

Lastly, the claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED.**

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John A. Peno

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Cloyd (Robby) Robinson

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Monique F. Kuester

AMG/fnv