

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

DENISE L STONEBURNER

Claimant

and

MENARD INC

Employer

HEARING NUMBER: 18BUI-01796

EMPLOYMENT APPEAL BOARD
DECISION

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

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. 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 Employment Appeal Board would adopt and incorporates as its own the administrative law judge's Findings of Fact with the following modification:

The Claimant usually does not bring her cell phone into the store while working. (21:10-21:17) However, because it was cold that day and she feared the cold temperature would 'turn her screen black,' she brought the phone in with her. (21:02) The Claimant didn't realize her phone was on until it started ringing as a guest approached. (20:41) In an effort to reduce guest interference, Ms. Stoneburner tried to shut the phone off. (20:55-20:57)

When confronted, she tried to offer the Employer an opportunity to review her phone records to show she wasn't texting, but the Employer indicated he didn't need them. (26:08-26:25) Other employees had been given a three-day suspension for using their cells phone in the past. (27:10-27:25)

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 Claimant was a long-term employee that both parties admit had no prior history of any disciplinary action taken against her. (14:44; 27:52) She admitted being on her cellphone but provided a credible explanation that she was merely trying to shut it off and that she was *not* texting. She also provided a cogent explanation for why she had her phone with her in the first

place. While we understand that the Employer has a hard and fast policy against cell phone usage while on duty, it was not unreasonable for the Claimant to bring her phone in under the circumstances, and to take immediate action to quiet her phone that started ringing. We would also note that the Employer did not refute her testimony that other employees had been caught using their cell phone while on duty, and were suspended, not terminated.

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We find Ms. Stoneburner's testimony credible that she wasn't intentionally ignoring a customer on the date in question (25:11); rather she made an instinctive, split-second decision to rectify a situation in order to assist the guest before her. No doubt, the Claimant violated company policy for which a customer complained; however, based on the record before us, we find that this was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. For this reason, we conclude that the Employer has not satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated March 7, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

Ashley R. Koopmans

James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

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

Kim D. Schmett

AMG/ss