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

TERA J HANSON	:	
Claimant,	:	**HEARING NUMBER:** 13B-UI-08692
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
MURPHY OIL USA INC	:	
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

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. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Tera Hanson (Claimant) worked for Murphy Oil USA (Employer) most recently as a full-time store manager of the Storm Lake store from May 3, 2011 until she was fired on June 29, 2013. In November 2012 the Claimant received a warning due to her store failing a mystery shopper test when a subordinate of the Claimant failed to properly request the ID of a mystery shopper seeking to buy tobacco. (Ex 1, p. 10). Under the Employer's policy if, in a twelve month period, a store fails six mystery shopper requests for tobacco by not properly seeking the ID of the shopper, the store manager is terminated. (Ex. 1, p. 2). The Claimant continued to receive warnings, the most recent being in April 2013 when her store had reached 5 such failed mystery shops. (Ex. 1, p. 4). In response to these warnings the Claimant had trained her employees on the identification policy as instructed and had taken all corrective actions required by the Employer. In response to the fifth failure the Claimant told her staff that from then on if any employee failed a single mystery shop that employee would be fired. The Claimant had no more she could have done to prevent the final mystery shop failure. On June 24, 2013 the Claimant's store failed the sixth mystery

shop. (Ex. 1, p.2). As a result of the sixth failure in a 12-month period the Claimant was fired. She was fired for the failure of the mystery shop by a subordinate not for any act or omission that the Claimant herself had engaged in.

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:
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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).

It is clear that to qualify as an act of misconduct of a claimant an action must actually be committed by that claimant. We understand the point of the Employer that a manager bears ultimate responsibility. But failing to live up to your responsibilities is not the same as an intentional and willful disregard of the Employer’s interests. Of course, a failure to act can constitute misconduct but again only if the failure is a failure of the

Claimant to personally do some act. In other words, a claimant cannot vicariously commit misconduct. It is not enough that a bad thing happened. To find misconduct we need to point to some act or omission of the Claimant that led to the problem. If the problem is traceable to a subordinate of the Claimant then we still need to find something the Claimant did that led to this error by the subordinate. We would need to find, for example, a failure to train the subordinate, a tolerance of previous errors by subordinates thus implying that the errors were acceptable, a failure to share information, a failure to implement management controls etc.. There is simply not adequate proof of this in the record. The most we have is that the subordinates had in the past continued to make the mistake of not carding. But the Claimant had indeed taken reasonable and proper steps as a manager, so much so that the Employer even opined that it did not know what else the Claimant could have done. The Claimant thus was doing all that could be expected and the subordinates screwed up anyway. This is not, at base, the Claimant's failure. While she had had problems with her staff in the past, the problem that final day was not the result of anything the Claimant did or did not do. She cannot be charged with misconduct for an event that she had done everything possible to prevent.

The law provides that past acts and warnings can influence the determination of misconduct:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). While prior incidents affect the weight of the final incident they do not dictate its character, that is, if the final incident does not involve intentional action or even negligence it cannot be the basis of a disqualification. Past acts of possible misconduct are taken into account when considering the "magnitude of a current act". They do not convert reasonable and proper precautions into misconduct just because an event occurred that was similar to one which had occurred in the past, even assuming those past events were the Claimant's fault (and even this was not proven). If blameless conduct that triggers a discharge could be changed into misconduct based what happened in the past then the discharge would not be for a current act of "misconduct." Here benefits are allowed as the final act that precipitated the discharge (the current act) was not proven to be misconduct, even given the Claimant's prior history.

DECISION:

The administrative law judge's decision dated September 3, 2013 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.

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John A. Peno

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Cloyd (Robby) Robinson

RRA/fnv