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

PATRICIA A VESSELLS	:	
	:	HEARING NUMBER: 07B-UI-09867
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
CRIC COST CUTTERS LTD	:	
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. 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:

Patricia Vessells (Claimant) was employed as a full-time stylist by Cric Cost Cutters (Employer) from July 28, 2005 until the date of her discharge on September 19, 2007. (Tran at p. 2; p. 12-13). The Claimant's supervisor was manager Jean Strottman. (Tran at p. 3; p. 10). A manager at another salon was Deborah Freeman. (Tran at p. 4; p. 10). The district manager for the Employer was Aimee Sosa. (Tran at p. 1).

On September 17, 2007, Ms. Sosa met with the Claimant. (Tran at p. 3-4; p. 14). Ms. Sosa discussed with the Claimant that she had supposedly lied about her reason for missing work the previous Saturday and that she was filling out an application for another job while on duty. (Tran at p. 4; p. 13-14). The

Claimant was

complaints including allegations that the Claimant had visibly sighed and rolled her eyes as a customer came in at closing, that the Claimant was criticizing the company, and that the Claimant expressed dismay at the fact that if she quit she would not get her holiday bonus. (Tran at p. 4; p. 5; p. 7). At hearing the Claimant denied having complained about the Employer any more than any of her co-workers. (Tran at p. 17). The Claimant testified, without contradiction, that she was in fact ill on the Saturday in question. (Tran at p. 17). The Claimant denied saying that she would quit or tried to get fired in December. (Tran at p. 17).

On September 18, 2007, Ms. Sosa received a call from a customer, Ardith Lane, about the claimant. (Tran at p. 2-3). Ms. Lane told Ms. Sosa that Ms. Lane had come in earlier on the 17th and checked in with the Claimant, supplying her phone number. (Tran at p. 3). Ms. Lane alleged to Ms. Sosa that the Claimant had acted as if she did not have time for Ms. Lane's haircut and that she felt the Claimant had been rude. (Tran at p. 3). The Claimant did cut Ms. Lane's hair that day. (Tran at p. 3; p. 15). The alleged incident with Ms. Lane occurred before the conversation with Ms. Sosa on the 17th. (Tran at p. 6; p. 15). The Claimant testified that Ms. Lane must have misread her in some way and only asked "are you busy" which the Claimant took as a sort of mild sarcastic comment and the Claimant then replied that it was "fine" and took Ms. Lane back for a cut. (Tran at p. 15). The Employer has failed to prove by a preponderance of the evidence that the Claimant was in fact rude to Ms. Lane.

After receiving that complaint Ms. Sosa met with Ms. Vessells on September 19, 2007, and discharged her over the allegations of poor attitude and the allegations made by Ms. Lane. (Tran at p. 2; p. 5-8; p. 13). Although attendance was discussed with the Claimant at the termination the Claimant had not been previously told her attendance was a problem. (Tran at p. 8; p. 17).

The Employer has failed to prove any of its allegations of misconduct by a greater weight of the evidence. In reaching this conclusion we have weighed the evidence and found the Claimant's to be more credible.

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:
>
> 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

> 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).

In making our rulings today we have weighed the evidence, and is so doing have taken into account that the Employer presents only hearsay evidence.

The filling out a job application incident is based on the hearsay statement of Ms. Freeman. Even if we ignore this, however, the Employer has failed to prove the Claimant was actually filling out an application on company time. The testimony was that Ms. Freeman saw an application on the break room table. (Tran at p. 4; Ex. 1). Even crediting this hearsay, it is not proof of when the application was filled out. It could have been filled out before work or while on break and yet still be on the table. If the Claimant is doing person business while on break this is not misconduct.

The other allegations are also based on hearsay. The testimony that the Claimant was trying to get fired was based on what Ms. Geels told Ms. Strottman who then repeated this to Ms. Sosa. The statement of the Claimant, as statement of a party, is not hearsay but the Geels and Strottman satements are. Similarly statements that the Claimant was bashing the company are at least single hearsay, and to the extent that Ms. Sosa seems to be repeating what she was told by Ms. Strottman, it is double hearsay. (Tran at p. 3 ["I talked to the manager, her name is Jean Strottman."]; p. 5). The eye-rolling incident was allegedly witnessed by Ms. Strottman who did not testify and thus is at least only single hearsay.

(Tran at p. 7). The statements submitted by the Employer as Exhibit 1 are, of course, also hearsay.

When the record in support of a party is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a

common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608. "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." Walthart v. Board of Directors of Edgewood-Colesburg Community School, 694 N.W.2d 740, 744-45 (Iowa 2005). Weighing these factors in this case favors the Claimant.

The Employer offered no reason why the eyewitnesses, including two managers, did not testify. We are left with Ms. Sosa's descriptions of what others had told her and brief written statements. Since most of the witnesses were employed by the Employer the cost of acquiring more direct testimony has not been shown to be anything but slight. Since the events they witnessed were the basis of the discharge, and contested by the Claimant, the need for precision in her statement was high and the policy to be fulfilled is laid out in the statute which places the burden of proving misconduct on the Employer. The need for precision is particularly high when dealing with subjective assessments over whether the Claimant was "rude", or was too visible in her eye-rolling, or complained too vehemently about work (since ordinary griping is not misconduct). The basis for such characterizations is an essential issue that is routinely explored on cross-examination. Since that opportunity was denied here and, given the other factors bearing on the hearsay, we have given more weight to the Claimant's testimony.

Finally, the Employer has not presented evidence of excessive unexcused absence as required by 871 IAC 24.32(7). (Tran at p. 10; p. 17). The Employer has failed to present evidence on whether the absences were for reasonable grounds (like personal illness, or bereavement), whether they were properly reported, and indeed whether they were excessive.

DECISION:

The administrative law judge's decision dated November 7, 2007 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. The overpayment entered against claimant in the amount of $759.00 is vacated and set aside.

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Elizabeth L. Seiser

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John A. Peno

kjo

DISSENTING OPINION OF MARY ANN SPICER : 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. The hearsay in this case is from multiple sources. It is in testimony and confirmed in writing. Moreover, the information on the most egregious incident, with customer Ardith Lane, comes from a person whom the Employer had good reason not to pester with a subpoena: she was a customer. She had no motivation to lie but took the trouble to call Ms. Sosa and to fill out a written letter of complaint. The Employer should need no more than this to prove misconduct. See Grover v. Employment Appeal Board, (Iowa App. 6/27/2007). I would therefore affirm the Administrative Law Judge.

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Mary Ann Spicer

RRA/kjo