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

TINA LEIBOLD	:	
	:	**HEARING NUMBER:** 10B-UI-04436
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
HY-VEE 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: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer 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:

The claimant, Tina Liebold, worked for Hy-Vee, Inc. from August 3, 2007 through February 2, 2010 as a part-time kitchen clerk. (Tr. 3-4, 11-12, 22) At the start of her employment, the claimant signed an acknowledgement of receipt of the employer's handbook. (Tr. 6-7, 8, 10, Employer's Exhibit 2) The handbook contains the employer's 'zero tolerance' policy for "…removing company property without authorization….or the theft of property…" (Tr. 5, Employer's Exhibit 1)

On January 30, 2010, the claimant was going through the check-out when Allison Knepper (assistant manager) inquired if the claimant needed to pay for the two pieces of celery the claimant had, outside of her grocery items. (Tr. 4, 13, 17, 18-21) Ms. Liebold responded that Kathy Stilson (assistant kitchen manger) (Employer's Exhibit 5) told her the celery stalks were free of charge. Allison accepted this response and later questioned Ms. Stilson about the matter who relayed to Allison that she, specifically, told Tina that she should pay 50 cents for the celery. (Tr. 19)

The employer initiated an investigation. (Tr. 13) Mike Erschen revealed that he was in the vicinity and overheard the conversation between Kathy Stilson and Ms. Liebold at the time she asked if she had to pay for the items. (Tr. 13, 20-21) Mr. Erschen assumed the claimant put the celery back into the refrigerator when she was told about the 50-cent charge. He gathered this based on the claimant's expression ('snotty look') and return to work. (Tr. 21)

On February 1st, Jeff Buxton (kitchen supervisor) called Ms. Liebold on the phone to set up a meeting between her and Adam Gillies (manager of perishables). (Tr. 25) (Tr. 6-7, 8, 10, Employer's Exhibit 2) Since Mr. Gillies couldn't meet with her that day, the meeting was scheduled for Tuesday, February 2nd, 2010. When she arrived at the workplace, Mr. Gillies questioned her and subsequently terminated her for theft. (Tr. 25-26) The claimant had no prior history of discipline for any such behavior. (Tr.

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).

Iowa Code section 96.6(2) (2009) provides, in pertinent part:

> …If an administrative law judge affirms a decision of the representative, or the Appeal Board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.…

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 record establishes that the employer has a 'zero tolerance' policy for which the claimant had knowledge based on her acknowledgement signature of receipt the handbook dated July 30, 2007. (Tr. 6-7, 8, 10, Employer's Exhibit 2) Thus, when she passed through the line, she knew that she was liable to pay for the celery unless she had prior authorization to take the items for free. Although she argues that she did have such permission, the employer provided ample evidence to refute her assertions. Kathy Stilson provided an affidavit, which is corroborated by several witnesses that Ms. Liebold was, in fact, informed about the 50-cent charge. While Ms. Stilson's affidavit is hearsay, hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency. (Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995) Whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982). We would also note that the employer provided a legitimate excuse for Ms. Stilson's absence from the hearing. (Tr. 13-14)

We have two employees, who corroborated that Ms. Liebold was not given permission, i.e., Allison Knepper who spoke with Ms. Stilson about the incident at check-out, and Mike Erschen who overheard the claimant discuss with Ms. Stilson about the purchase of the celery stalks some time prior to check-out. The employer's witnesses corroborated that the claimant lied about having permission. Her excuse that she had been allowed to take carrots and celery freely in the past is not probative that she was given permission in this instance. The employer has a 'zero tolerance' policy in place for a reason. Even the smallest of such infractions could add up significantly if the employer were to allow all employees to nickel and dime the employer for merchandise on a daily basis. Ms. Liebold should have known her job would be in jeopardy if she took even the smallest amount of merchandise without paying. It's irrelevant that she had no prior incidents of theft. The fact that she had just this one, in light of the employer's zero tolerance is certainly worthy of termination. As for disqualification for benefits purposes, a single act of lying to an employer to cover-up a workplace error can itself be misconduct. White v. Employment Appeal Board, 448 N.W.2d 691 (Iowa App. 1989) Based on this record, we conclude that substantial evidence supports that the claimant acted intentionally when she not only lied about having permission, but committed theft of company property in violation of the employer's policy. She is

disqualified for benefits.

DECISION:

The administrative law judge's decision dated May 7, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Although this decision disqualifies the claimant for receiving benefits, those benefits already received shall ***not*** result in an overpayment. Nor will the employer's account be charged.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv