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

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| TIERNEY ISRAEL | : | |
| | : | HEARING NUMBER: 09B-UI-09352 |
| Claimant, | : | |
| | : | |
| and | : | EMPLOYMENT APPEAL BOARD |
| | : | DECISION |
| CASEY'S MARKETING COMPANY | : | |
| 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 DENIED**

The employer 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 Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact.

**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).

We agree with the administrative law judge that the video Ms. Israel filmed, edited and posted (Facebook and YouTube) (Tr. 7-9, 16) in April 2009 was clearly contrary to the employer's interests in that it shared proprietary information. The video also demonstrated open hostility toward, and a threat directed at customers and staff. (Tr. 7, 8, 11, 13, 15) The video showed at least two Casey's employees (the filmmaker and the filmed subject) engaged in horseplay in the employer's store kitchen. Although the claimant extensively tried to minimize her behavior, the fact remains that she knew the employer's policy (Tr. 10-11, 17, Exhibit 4) as acknowledged by her signature dated November 27,

2006. (Tr. 10, 12, Exhibit 5) There is no doubt that her failure to comply with that policy demonstrated a blatant and



willful disregard of the employer's interests, even by her own admission of the inappropriateness of her actions. (Tr. 16, lines 7-9) Given the nature of her action and its potentially damaging effect to the employer's business reputation, we believe she engaged in misconduct.

We disagree with the administrative law judge's determination, however, that the final act was not current. Once the employer learned of the unauthorized videos (Tr. 6), the employer viewed the videos (Tr. 7-8), one of which the claimant made while at work practically the same day the employer viewed it. (Tr. 15, lines 4-11) It's not clear from the testimony how long the employer evaluated the internet postings, or which corporate channels she had to check in with before talking final action. On its face, however, the one week delay (Tr. 4, 15) between the employer's knowledge of the incident and taking action does not render the action to be untimely. For this reason, we find the employer satisfied their burden of proving their case.

## DECISION:

The administrative law judge's decision dated July 21, 2009 is **REVERSED**. 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." In addition,

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....

We would also note that although this decision disqualifies the claimant for receiving benefits, those benefits already received shall ***not*** result in an overpayment.

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

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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John A. Peno

AMG/fnv