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

RICHARD T SPENCER Claimant, and COLE INFORMATION SERVICES INC Employer.	:	**HEARING NUMBER:** 07B-UI-07973 **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. 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:

Richard Spencer (Claimant) worked full-time as a production shift manager for Cole Information Services (Employer) from August 23, 2006 until June 4, 2007. (Tran at p. 5; p. 9; Ex. 2). The Employer has a policy against harassment. (Ex. 3). On May 31, 2007 a female subordinate filed a complaint of harassment with the Employer naming the Claimant. (Tran at p. 6). The complainant claimed that the Claimant had told her "lift up your shirt". (Tran at p. 6-7). When questioned by the Employer the Claimant initially denied making the statement. (Tran at p. 7; p. 9). The person complaining was not identified to the Claimant. (Tran at p. 10; p. 13). The Claimant went home and thought about the statement and realized that he may have said something like that as part of his safety responsibilities. (Tran at p. 10).

Subsequently the Claimant recalled that he did tell the subordinate to lift up her shirt because she was standing with loose clothing by wrapping equipment. (Tran at p. 7; p. 10; p. 14; Ex. A). This was a safety problem and the Claimant explained this is why he made a comment about her shirttails. (Tran at p. 7; p. 11; p. 12; p. 14; Ex. A). Nevertheless the Employer decided to terminate him for violation of the sexual harassment policy. (Tran at p. 6; p. 8; p. 9). The Employer has failed to prove by a greater weight of the evidence that the Claimant made the comment about the shirt in a context other than what the Claimant says.

In our making findings we have considered Exhibit A. This exhibit is not the original from the Iowa Workforce Development file since that agency lost the exhibit. We obtained a copy from the Claimant's attorney and used this. We have previously explained this when we transmitted the record to the parties and we received no objection. We therefore treat this copy as an accurate reproduction of the original.

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 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).

As an initial matter we make very little from the screening decision of the Iowa Civil Rights Commission. The Commission relies on written responses to questionnaires, position statements, and other written evidence when making screening decisions. 161 IAC 3.12. "An administrative closure resulting from preliminary screening is merely an estimation of the probable merits of the case based on the experience and expertise of the commission." 161 IAC 3.12(3). The standard for screening is whether there is a reasonable possibility of finding probable cause of discrimination. 161 IAC 3.12. We note that over the past three years the Civil Rights Commission has found probable cause is only 1% of the cases it closed. Iowa Civil Rights Commission, Combined Annual Report, 2003-06. Furthermore the Civil Rights Commission is concerned with whether the Employer's actions were discriminatory, not with whether they might have been in error, based on too little information, or were unduly harsh. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Our concern is not with the motive of the Employer in taking its action but with whether the Employer has proved that the Claimant engaged in deliberate misconduct. In a civil rights case a good faith mistake of the Employer negates a finding of discriminatory animus, whereas under the Employment Security Law a good faith error by the Claimant is not misconduct. Under the unemployment law the standards are different, the issues is different, and the burdens are different. The Civil Rights screening decision, which is a pre-investigation process, is not due much weight from us.

The only evidence in the record is out of the mouth of the Employer's Human Resource Manager, Tammy Shull. She was not a witness to any alleged incident of harassment. The Employer thus attempts to prove misconduct with hearsay. The Employer alleges that it had several witnesses. Yet the Employer did not produce any witness. Nor did the Employer even produce any written statements from any of these witnesses. Nor does the Employer even attempt to explain why this superior evidence was not produced. We do not automatically find that hearsay will be outweighed by live testimony. Walthart v. Board of Directors of Edgewood-Colesburg Community School, 694 N.W.2d 740, 744-45 (Iowa 2005); Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Yet the fact that the Employer chose to rely entirely on hearsay is a significant factor we must take into consideration when determining if the burden of proof has been carried.

The Claimant alleges that the subordinate and the witnesses have reason to resent him over his discipline of them, and that they gave false testimony for that reason. (Tran at p. 12; p. 14). He also calls into question whether one witness was present during enough of the exchange to understand the context of it. (Tran at p. 11-12). While we cannot conclude that the witnesses were in fact biased or unreliable, personal bias and opportunity to observe are essential issues that are routinely explored on cross-examination. Since that

opportunity was denied here and, since we have a first-person denial by the Claimant, we have given more weight to the Claimant's testimony on the question of harassment. We recognize that what is most potentially most damaging to the Claimant's story is the fact that he admittedly did not tell the Employer about the shirt remark when first asked about it. Yet we find it credible that given the fact that the incident, as described by the Claimant, was fairly pedestrian and the fact that he was not sure just whom they were talking about that he may have taken some time to realize just what was the source of problem. It is also of some slight aid to the Claimant that he did offer to pay for a polygraph and that his denials appear heartfelt. We do not say the Claimant has an ironclad story. But it is not the Claimant who has to prove anything; the burden is on the Employer. Had the Employer produced the witnesses or even the witness statements we might, depending on what that evidence showed, have reached a different conclusion. As it stands we cannot find that the Employer has proved by a preponderance of the evidence that the Claimant committed misconduct.

DECISION:

The administrative law judge's decision dated September 12, 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 $2,520.00 is vacated and set aside.

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Elizabeth L. Seiser

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John A. Peno

RRA/fnv

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.

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Mary Ann Spicer

RRA/fnv