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

CYNTHIA FELDOTT Claimant, and CARGILL INCORPORATED NUTRENA FEEDS Employer.	:	HEARING NUMBER: 08B-UI-05178 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:

Cynthia Feldott (Claimant) was employed as a full-time administrative customer service representative for Cargill Inc. (Employer) from May 17, 2006 until the date of her discharge on April 25, 2008. (Tran at p. 2; p. 17). On December 19, 2007, the Employer issued a Performance and Behavior Expectations memo to the Claimant detailing the "minimum requirements and expectations for (the Claimant's) role during the river close from December 2007 through March 2008" (Tran at p. 4-5; Ex. 1). On January 18, 2008, the Employer conducted the Claimant's quarterly performance review (Tran at p. 5-6; Ex. 2). It stated that the Claimant "meets some" of the overall performance criteria (Ex. 2). The Employer indicated it "would like to see her follow through in the development process by also providing team

members constructive feedback" rather than becoming frustrated with temporary employees and not showing them how to

perform tasks correctly. (Tran at p. 5-6; Ex. 2). It further stated that the Claimant "could benefit by channeling her frustrations into positive energy to create/suggest opportunities for improvement in our processes" (Ex. 2).

On February 20, 2008, Accounting Manager Emily Halfpap documented a conversation she had with the Claimant concerning the Claimant's display of her poor attitude. (Tran at p. 7; Ex. 3).

On March 6, 2008, the Employer issued a 90-day Performance Improvement Plan (PIP) to the Claimant covering her attitude and demeanor such as "Discuss, Decide, Champion and Supporting Decisions; Demonstrate Respect, Candor and Commitment; Pursue and Reinforce Collaboration: Managing Conflict; Ensure and Accept Accountability Taking Responsibility; and Challenge, Innovate, Change Demonstrating Adaptability" (Tran at p. 9-10; Ex. 4). The Claimant signed the PIP which stated that if her performance did not improve a Disciplinary Improvement Plan would issue (Ex. 4).

On April 15, 2008, the Employer issued a 30-day Disciplinary Improvement Plan which restated the behaviors listed in the PIP and added four situations under Knowledge/Execution where the Claimant failed to perform as expected (Tran at p. 10-12; Ex. 5 see also p. 16 [discussing "performance" issues]). The Disciplinary Improvement Plan stated that if "it becomes clear at anytime throughout the next 30 days that you will not achieve the objectives, the result will be termination of employment" (Ex. 5).

Following the Disciplinary Improvement Plan and on April 25, 2008, the Employer met with the Claimant at 8:30 a.m. and told her it had not seen any improvement in her behavior or performance and her employment was terminated (Ex. 7). The Employer failed to produce any evidence concerning specified unsatisfactory actions of the Claimant between April 15 and April 25. (Tran at p. 2; p. 13).

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: 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:
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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).

In consonance with this, the law provides:

> *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 Lee v. Employment Appeal Bd. 616 N.W.2d 661, 665 (Iowa,2000); Ringland Johnson, Inc. v. EAB, 585 N.W.2d 269, 271 (Iowa 1998); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 507, 510 (Iowa App. 1985). This provision means that even termination for acts of misconduct are not disqualifying if the acts are not "current acts" of misconduct. This does not mean the prior problems are irrelevant but that the only proper use of a claimant's previous issues is as background for assessing the seriousness of the final act. In other words, the prior acts could operate as a contributing cause to the termination – by enhancing the seriousness of the final act. But those prior acts do not convert a mistake into a willful act of misconduct and they cannot themselves constitute disqualifying misconduct.

Thus even when we find that allegations made by an employer would establish misconduct there remains whether the alleged acts were current in terms of the discharge. In determining whether a discharge is for a current act we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination, or at least of notice to the employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the Employer. Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given). In the past a different majority of this Board has held that if an Employer acts as soon as it reasonably could have found out about the infraction under the circumstances then the action is for a current act. The majority members in this case are not in total agreement on the standard for determining if an act was

"current". We do agree, however, that even under the standard that is more favorable to employers the Employer has failed to establish a current act in the context of this particular case.

No Final Act: The evidence in this case gives us no idea of what specifically the Claimant did that caused the Employer to believe she had violated her Disciplinary Improvement Plan. We recognize that a final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). But all this means is that the final act need not be as serious to rise to the level of misconduct. It still has to be intentional or be repeated negligence, and a Claimant would still have to have a reasonable warning that the action in question is the sort that has been prohibited. All we have here is that the Claimant allegedly continued to do the same "sort" of things. We have absolutely no idea what she did, who reported her doing it, what effect it had, why she did it, etc. We must have some basis for assessing whether, even considering the discipline history, the Claimant committed misconduct. A final warning, in other words, is not carte blanche. It does not mean that anything the Claimant does that displeases an Employer will be misconduct. In short, the final acts, whatever they might be, have not been proved to be misconduct even taking into account the prior discipline.

Given the Employer's non-specific allegations about what happened following the Disciplinary PIP we are left only with the events that triggered that discipline. Here even assuming that these prior actions of the Claimant would be sufficient to constitute misconduct under the law the question would then become whether they were current in terms of the discharge. We conclude that they are not. Obviously the Employer knew about them when it gave the Disciplinary PIP and thus the reason for delay until the 25th is not justified by a need to investigate. Of course, we understand the Employer delayed because it was not planning to terminate based on those actions, but without a specified final act this reason is not good enough to make the prior acts current ones.

No final act of misconduct has been proved, and the only acts that have been proved as possibly being misconduct were not current acts. Under this state of affairs the Claimant is not disqualified.

Poor Performance Not Disqualifying: The other problem with the vague allegations of the Employer concerning the precipitating cause of the discharge is that we have two things that led to her final warning. We have her bad attitude and we have her poor performance. As a general matter poor performance, when not intentionally so, is not misconduct. Bad attitude, when pervasive enough, can be. The Employer warned the Claimant over both these problems in its Disciplinary Performance Improvement Plan. Then the Claimant was terminated for violating the plan. As we have discussed, however, that violation is not explained. Was it more bad attitude or was it more poor performance, or was it both? We do not know.

The problem with this is that, as to the performance issues, we do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which [s]he usually worked." Lee v. Employment Appeal Board, 616 NW2d 661, 668 (Iowa 2000). It is true that the Claimant had a bad attitude. It does not follow of necessity that she was intentionally doing a poor job. It could be her bad attitude caused her poor performance but it also could be that she developed a bad attitude out of her frustration with her incapacity at this job. We have no basis for choosing between these alternatives. Here we have no proof that the Claimant ever performed the job to the level the Employer expected after two years. We have no showing that she ever displayed performance to the

level expected of an experienced employee. As far as we know she never demonstrated satisfactory competence and, based on this record, we cannot infer that this was intentional rather than inability. A simple incapacity is not misconduct, Newman v. IDJS, 351 N.W2d 806 (Iowa 1984); Richers v. Iowa

Department of Job Service, 479 N.W.2d 308 (Iowa 1991), and the Claimant is therefore not disqualified from benefits based on the performance problems. The facts do not support any finding of deliberate errors by the Claimant nor negligence of such a degree as to manifest equal culpability.

We recognize that maybe the Claimant's final problems also involved bad attitude and not just performance problems. But without some proof on this we are flying bind. Had we been able to conclude that each of the potential causes of the termination would have constituted misconduct then we would not have worried over the question of performance deficiencies as misconduct, although the final act issue discussed above would remain. Instead we have two possible causes of the termination, one potentially disqualifying and one not, and no guidance at all on what role each played. As an alternative to our ruling that the Employer failed to prove a final current act precipitating the discharge, we also hold that the Employer failed to prove that the Claimant's discharge was due to something other than non-disqualifying poor performance.

DECISION:

The administrative law judge's decision dated June 16, 2008 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 $1,490.00 is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss

DISSENTING OPINION OF MONIQUE KUESTER:

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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Monique Kuester

RRA/ss