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

BILL S OGLESBY	:	
	:	**HEARING NUMBER:** 15B-UI-08389
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: 96.5-2A

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. 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:

Bill Oglesby (Claimant) worked for Casey's Marketing (Employer), most recently as a part-time associate in the kitchen, from October 23, 2014 until he was fired on May 26, 2015. The Claimant reported directly to Kitchen Manager Corrine Chapney and ultimately to General Manager Crystal Running.

The Employer has a policy regarding the removal of company property which states company property is not to be removed from the store without manager approval. (Employer's Exhibit 3). The Claimant signed he had read and would comply with the policy on his most recent date of hire. The Claimant knew that unauthorized removal of company property could get him fired. The Claimant was terminated for unauthorized removal of company property.

On May 25, 2015, Area Supervisor Deb Waage was asked by Running to review the surveillance footage from May 16, 2015. Waage did and observed the Claimant removing a newspaper from the newsstand and eventually leaving the store without paying for it. She also observed him pick up an ice cream cone, place it on the counter, and purchase lottery tickets before leaving for the day. The Claimant did not pay for the ice cream cone. He was then terminated for taking these items without paying for them in violation of company policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) 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 note that the Employer introduced into evidence the wrong video on the ice cream cone theft. That video, in a plastic case labeled "2 of 2" is from May 15 not May 16 and no ice cream cone appears in the video, and the Claimant does not appear in it either. Nevertheless the testimony from both parties is clear that the cone was not paid for, and that the lottery tickets were, and we are able to make our decision on the testimony alone. The real issue is the credibility of the denial of any intent to take the cone without paying.

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found the Claimant's testimony that he intended to pay for the ice cream to be not credible. A scratch ticket price is always the same, is well known, and comes out on the dollar, and it is not credible that the Claimant would be unaware that he got both ice cream and tickets for just the price of the tickets. Similarly we find it incredible that the Employer had a practice of just giving away newspapers to its workers. The claim on free food and papers as a sort of bonus is not credible in light of this clear policy. We further note that although the Claimant presented evidence that multiple employees took food without paying, he himself testified that he was aware that he could be discharged for taking food without paying, and denied any intent to take the ice cream without paying. We find that the Claimant took the items intentionally when he knew this was not permitted.

Theft from an employer is generally disqualifying misconduct. *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). In *Ringland* the Court found a single attempted theft to be misconduct as a matter of law. Even the theft of a item of negligible value a single time can be misconduct. Instructive on this point is the case of *Tompkins-Kutcher v. EAB*, No. 11-0149 (Iowa App. 2011). In that case a claimant, who also worked for Casey's, took home for her use some wasted soup and was disqualified for it. The soup was out of date and could not be sold. She was instructed to take the soup to the dumpster and instead she took it to her car. On appeal she argued that this was no great loss to Casey's, and that what she was doing made common sense, yet she lost. The reason was that Ms. Tompkins-Kutcher violated Casey's policy: "However, the agency's decision did not turn on whether or not the soup was garbage. The agency's decision was based on Tompkins-Kutcher's violation of the company's policy that all items removed from the store, regardless of whether the item is outdated, must be paid for." *Tompkins-Kutcher*, slip op. at 6. Just so the Claimant here engaged in similar intentional infractions, and so we

disqualify him for misconduct. As in *Thompkins-Kutcher*, we do not base our decision on whether or not the newspaper or the ice cream had much value, rather we base our decision on the Claimant's knowing violation of the company's policy.

Even though only two instances of theft on a single day is proven, such an action cannot be an isolated instance of a good faith error of judgment because it is not a good faith action. Indeed, we find that either theft alone would be enough for us to deny benefits. All benefits are denied until the Claimant has requalified.

DECISION:

The administrative law judge's decision dated August 21, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

_____
Kim D. Schmett

_____
James M. Strohman

SPECIAL CONCURRING OPINION OF ASHLEY R. KOOPMANS:

Although I concur with the decision to deny benefits, I would do so only on the newspaper issue. I find that the ice cream cone was an oversight by the cashier not caught by the Claimant who was on the way out the door at the end of his shift. The newspaper theft, however, was clear and of sufficient seriousness to constitute misconduct.

_____
Ashley R. Koopmans

RRA/fnv