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

JANIELLE K KAYSER Claimant, and ACCESS DIRECT TELEMARKETING INC Employer.	:	HEARING NUMBER: 09B-UI-03081 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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Janelle K. Kayser, worked for Access Direct Telemarketing, Inc. from July 31, 2006 through January 9, 2009 as a full-time team member/consultative sales representative at the employer's Cedar Rapids, Iowa call center. (Tr. 3,) The employer has a zero tolerance policy for profanity on the call floor for which the claimant receiving training and admitted having knowledge. (Tr. 4-5, 11)

On January 9th, Adam Wygle (claimant's supervisor) approached the claimant while she was on a call; he sought to coach her into probing the customer for additional information. (Tr. 5, 6,) Ms. Kayser became frustrated and when she got off the phone, she said, "Damn, why do you keep hassling me on this?" (Tr. 5) She told him she would appreciate if he would wait until after she's completed a call

before

he gave her any input. (Tr. 9-10) The claimant had been previously advised after she had complained about such interruptions, that the supervisor should wait until after the call is completed before making suggestions. (Tr. 14)

Mr. Wygle told her that her response was uncalled for and that he'd deal with the matter when other management came in. (Tr. 5) When the shift manager arrived, Mr. Wygle reported the incident that was, in turn, relayed to Human Resources. (Tr. 7) The employer questioned Ms. Kayser about the matter to which she admitted making the comments, but not saying 'damn.' (Tr. 7, 9-10) The employer terminated Ms. Kayser for violating company policy, i.e, using profanity on the calling floor directed toward her supervisor…" (Tr. 4) The claimant had never received any prior verbal or written warnings from the employer. (Tr. 11)

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).

Although the parties provided conflicting testimony as to whether Ms. Kayser used profanity while on the floor, the employer failed to provide any firsthand witnesses to corroborate Mr. Wygle's version of events. And even assuming arguendo that Ms. Kayser did say 'damn,' by all accounts of this record, it was an isolated instance of poor judgment. The claimant never received any prior disciplines regarding violation of company policy. And according to the claimant's testimony, she, basically, became upset because Mr. Wygle interrupted her call. It was not wholly unreasonable for her to prefer her supervisor to coach her after she's off a call, lest she become distracted and sound 'less intelligent' or unprofessional. She had been advised on past occasions that it was better for the supervisor to wait until she was finished with her call. Thus, the rationale for her response was in keeping with the employer's best interests (customer service).

While Ms. Kayser's tone in handling of the interruption may have appeared insubordinate, at worst, it was a single instance that did not rise to the legal definition of misconduct. We conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated March 27, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. 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 F. Kuester