

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

CYNTHIA S TOLLE

Claimant,

and

**ELECTROLUX HOME PRODUCTS
INC/FRIGIDAIRE**

Employer.

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HEARING NUMBER: 10B-UI-18996

**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: 96.5-2A, 96.3-7

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, Cynthia S. Tolle, was employed by Electrolux Home Products, Inc. from June 26, 1988 through November 17, 2009 as a full-time operator in the final pack area. (Tr. 2, 5) On November 16, 2009, the employer via Ms. Eli received information that Tom Tanner (Tr. 9), a salaried employee, told Human Resources that he observed Ms. Tolle smoking near her area of work. (Tr. 2-3) Mr. Tanner had previously been the claimant's foreman. (Tr. 9-10) Ms. Tolle was known to be outspoken in the workplace. (Tr. 6) Yvonne Russell (Labor Relations Manager) immediately investigated the matter. (Tr. 3, 5) Mr. Tanner wanted to remain anonymous. (Tr. 3,

The employer has a policy that expressly forbids smoking anywhere inside the facility. (Tr. 3) The claimant had been previously disciplined (three-day suspension) back on October 13, 2009 for smoking in that same area. (Tr. 3-4, 6) A second offense would lead to termination. (Tr. 4) Ms. Tolle denied the accusation. (Tr. 6, 7, 10) The employer terminated her the following day.

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).

The employer accused the claimant of smoking based on an allegation made by a salaried employee (Tom Tanner) who was not present at the hearing. Additionally, the employer's representative admitted she did not witness the incident, nor did she play any role in the investigation.

871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. *Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification.* If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved. (Emphasis added.)

The claimant denied the allegation and argues that though she is, admittedly, a confrontational person, she believes that the accusing co-worker (Tom Tanner) made the allegation in retaliation. The employer's case rests entirely on hearsay, as Ms. Eli, herself, did not participate in the investigation. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency (Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995), whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982) A reasonable person would not automatically presume that an accusation, absent any witnesses or corroboration, is the truth in light of the accuser's vehement denial. Ms. Tolle admitted knowing the consequences of smoking a second time and also admitted having learned her lesson from the first time. (Tr. 9-10)

Ms. Eli admitted she didn't know for sure about the veracity of the accusation (Tr. 5), and her argument that Mr. Tanner had nothing to gain by lying is not probative that the claimant did, in fact, smoke inside the premises against company policy a second time. Because the employer failed to provide any firsthand witnesses to refute the claimant's testimony, we attribute more weight to the claimant's version of events. For this reason, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated January 29, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

John A. Peno

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.

Monique F. Kuester