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

KEVIN OSGOOD	:	
	:	HEARING NUMBER: 09B-UI-07033
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
ACCESS DIRECT TELEMARKETING INC	:	
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: 96.5-2-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:

Kevin Osgood (Claimant) worked for Access Direct Telemarketing (Employer) as a full-time sales associate from October 27, 2008 until the date of his discharge on March 6, 2009. (Tran at p. 1; p. 8; Ex. A, p. 2). The Claimant was terminated for allegedly telling a customer that the product would pay off the balance on credit cards in the event of hospitalization when this is not true. (Tran at p. 2-3; p. 14). The conversation when the Claimant allegedly said this occurred on February 20, 2009. (Tran at p. 2-3). The Employer arrived at the conclusion that the Claimant had misrepresented the product on the 20th or 21st of February. (Tran at p. 4). This alleged misrepresentation was the final incident that caused the Employer to terminate the Claimant. (Tran at p. 2). The Claimant had been warned for similar issues on January 13 and 28, 2009. (Tran at p. 4; p. 6-7; Ex. A, p. 2). The Claimant was absent

following the 20th did work on March 1 through March 4. (Tran at p. 4; p. 10; p. 16). March 5 was his day off. (Tran at p. 10; p. 14; p. 16). He was not discharged until March 6. (Tran at p. 1; p. 8; p. 16; Ex. A, p. 2).

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.

"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).

The law limits disqualification to current acts of misconduct:

> *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 Ray v. Iowa Dept. of Job Service, 398 N.W2d 191, 194 (Iowa App. 1986); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 509, 510 (Iowa App. 1985). Even when we find that allegations made by an employer would establish misconduct, there remains, however, 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 is "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.

The most an Employer can ask, baring exceptional circumstances, is that it be allowed a delay in terminating so that it may conduct an investigation, draw a conclusion, and make necessary assessment of the seriousness of the infraction. Here the Employer had nothing to investigate following the 21sth and it had the whole week the Claimant was absent to think about what to do. In fact, the Employer doesn't really say it needed to think about it since the conclusion to terminate was, to the Employer, clear. We can understand waiting until the Claimant returns to work to fire him face-to-face. We cannot understand letting him work all week before firing him. This delay is just not explained or justified by the Employer. With no adequate explanation for the delay we are unable to conclude that the discharge was for a current act of misconduct under 871 IAC 24.32(8).

DECISION:

The administrative law judge's decision dated June 2, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

_____
John A. Peno

_____
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.

_____
Monique F. Kuester

RRA/ss