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

MARI M MOMBERG	:	
	:	HEARING NUMBER: 07B-UI-07558
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
IOWA WORKFORCE DEVELOPMENT	:	

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: 96.3(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, Mari Momberg, worked for Minnesota Mining and Mfg. Co. from October 18, 2004 through June 27, 2007 as a full-time warehouse operator. (Tr. 6, 23) In her position, the claimant's job responsibility is to drive a fork truck in which she retrieves goods as high as "... 60 feet or so... delivering goods back and forth..." (Tr. 7) She is required to wear a safety lanyard, "... which is a... heavy duty nylon belt that hooks to the safety belt that the employee wears and attaches to the truck... so if an employee happened to fall out of that truck... the lanyard keeps them from... falling more than a couple of feet..." (Tr. 6, 7)

The claimant received training at the start of her employment on the proper way to perform her duties. (Tr. 8-9) In mid-June of 2007, the employer issued a verbal warning to Ms. Momberg for "… brushing a pedestrian…" (Tr. 9, 20) On June 20, 2007, an employee reported to Josh Anderson, the claimant's recently new supervisor, that he believed an "… operator was sleeping in the warehouse…" (Tr. 17) The following day, Mr. Anderson investigated the matter and "… found a 'crown'… a cherry picker machine… with a fork… parked in the W aisle." (Tr. 18) He discovered Ms. Momberg sleeping while on break. She was "[a]pproximately 12 to 15 feet in the air." (Tr. 18-19) She wore neither her lanyard safety belt nor her safety glasses. (Tr. 6, 8, 10, 18) Ms. Momberg had stepped off the truck and into a rack where she slept while on break. (Tr. 8)

When the claimant came down from the rack, Mr. Anderson verbally warned her against the hazards of her action. (Tr. 19, 29) The claimant did not know she had done anything wrong because nearly 13 other employees had been doing the same thing on their breaks for which her previous supervisor, Mr. Wakefield, was aware; no disciplinary action had been taken for such behavior in the past. (Tr. 24-27, 31, 32) One of her co-workers (Jeff Peterson) agreed that employees routinely slept in the racks during their breaks, as did their third shift supervisor who slept at his desk on his break. (Tr. 33-34) This was common practice in the warehouse. Mr. Peterson received only a verbal warning for having his lanyard disconnected from his belt; and a one-day suspension for a second occurrence when he disconnected his lanyard to straighten a load. (Tr. 34)

The following night, the employer placed the claimant on a three-day suspension for the same incident. (Tr. 29) In the meantime, Mr. Anderson recommended that Ms. Momberg be terminated for violating a company safety rule. (Tr. 6, 20, 24) When she returned to the workplace on June 27, 2007, she was terminated. (Tr. 6, 24, 32-33)

The claimant applied for and was, initially, awarded unemployment benefits. A subsequent decision disqualified her, rendering the benefits thus far received to be an overpayment. See, 07A-UI-07558.

REASONING AND CONCLUSIONS OF LAW:

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.

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 claimant's supervisor terminated her for resting on an elevated rack in the warehouse during her break in which she removed her safety belt and lanyard in the process. Although the employer presents a cogent argument that her actions were a safety violation and provided ample documentation to support their argument, the record contains substantial evidence of a divergence between company policy and practice. Both Ms. Momberg and her witness provided credible testimony that it was common practice among employees to sleep on the racks during their breaks. (Tr. 33-34) While this practice is not to be condoned in light of the safety issues, the employer should have warned her before discharging her. Even considering Mr. Peterson's testimony regarding his safety violations for disconnecting his lanyard on two occasions, he received progressive discipline, i.e., first, an initial verbal warning, then a separate and subsequent suspension for the second violation. (Tr. 34)

In Ms. Momberg's case, her only warning came on the day of the incident for which she subsequently received a three-day suspension the following evening stemming from the same incident. (Tr. 29) She received no prior warning that her job was in jeopardy for such behavior, which was also practiced by several other employees without repercussion under a previous supervisor's supervision. (Tr. 22) Her resultant termination came as quite the shock to her particularly in light of her unblemished work record in which Mr. Anderson, himself, praised Ms. Momberg's her job performance as being "phenomenal." (Tr. 29) Additionally, the claimant received a rare significant strength on pay for performance for

having an outstanding attitude and a good role model etc… " (Tr. 29)

There is no doubt that the claimant's behavior was poor judgment, as a reasonable person would believe that such behavior would be contrary to the employer's interests. However, considering that her previous supervisor was aware of the claimant and other employees' similar behavior, we find this tacit acquiescence and tolerance of such activity to be a mitigating factor with regard to Ms. Momberg's culpability and actual knowledge that her actions could jeopardize her job. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

We agree with the claimant's argument that she should have been given a second chance. Based on her testimony, which is corroborated by Mr. Peterson, she had no idea that her behavior could result in termination under the circumstances. Had she been warned, and repeated this violation, then her termination would have more of a basis for disqualification. However, based on the foregoing reasons, we conclude that the claimant's poor judgment did not rise to the legal definition of misconduct such that she should be denied benefits.

DECISION:

The administrative law judge's decision dated September 5, 2007 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible. As for the overpayment created in 07A-UI-07558, it no longer exists as a result of this decision. See, 07A-UI-07557.

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Elizabeth L. Seiser

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AMG/fnv John A. Peno

DISSENTING OPINION OF MARY ANN SPICER:

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 with an additional comment. Ms. Momberg, through her own admission, testified that she took off her safety belt and safety glasses knowing that the employer's safety policy rendered the absence of these precautions to be a safety violation. Ms. Momberg's violation was amplified because she elevated herself 20 feet into the air (Tr.16, lines 13-16) to 'nest' on a pallet located in a set of racks of wooden racks that sat on the concrete floor below. These circumstances potentially caused a life-threatening situation, which could seriously and dangerously impact the work environment. The claimant's negligent and irresponsible behavior goes far beyond a good faith error in judgment, placing the employer in potentially serious liability if not corrected. For these reasons, I agree with the administrative law judge in concluding that the employer satisfied their burden by proving disqualifying misconduct.

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AMG/fnv

Mary Ann Spicer