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

TERRI L SEMBACH	:	
	:	**HEARING NUMBER:** 10B-UI-19482
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, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELGIBLE

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, Terri L. Sembach, was employed by Casey's Marketing Co. from November 21, 2008 through November 30, 2009 as a full-time cashier/cook. (Tr. 2, 6) The employer has a policy which provides that all employees "…will also receive 50% discount on all prepared foods, any item prepared in the store and kitchen or deli express sandwiches consumed at the store while on duty…maximum employee discount per day…upped to $7.00…" (Tr. 3, 5) The discount does not extend to family members. (Tr. 3, 5)

Every Friday or Saturday night that the claimant had to work, she would purchase a pizza with her employee discount and go sit with her family in the store to eat it for dinner. (Tr. (Tr. 8-9, 10) Other employees did the same thing with their family members. (Tr. 10) The claimant had never been warned that this was against the company's policy. (Tr. 5)

A new manager, Tammy Adams, started in November. (Tr. 10) On November 30th, the claimant purchased a large pizza using her employee discount to share with her son like she did every Friday or Saturday night that she had to work for the past year. This particular night, Ms. Sembach did not have time to eat the pizza with her son because she was too busy. She took two pieces out of the box and told him to take the rest with him. (Tr. 8) The employer observed what she believed to be the claimant giving a discount to 'a guy' for pizza. (Tr. 7) The employer terminated Ms. Sembach that same day, for pizza. (Tr. 7)

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 claimant provided unrefuted testimony that it was common practice throughout her brief employment history for employees on Friday and Saturday nights to purchase pizza their employee discounts, and eat it while on break with family. (Tr. 8-9, 10) The claimant, herself, had done this numerous times without any repercussions. Although the employer had a policy against taking discounted food out of the store, this policy was not enforced until after the new manager (Ms. Adams) came on board, which was the same month that the claimant was terminated. Ms. Sembach never received any warnings in the past or on that day that her job was in jeopardy for committing an act that she had done repeatedly in the past without incident. She did not believe she had done anything wrong. She purchased the food within the amount allowed with her discount; she ate the pizza in the store, albeit on this occasion, her son could not consume the pizza with her that evening. 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).

At worst, this may be considered an isolated instance of poor judgment in allowing her son to leave the premises with the pizza. Had the employer given her a warning for this incident, and Ms. Sembach disregarded the warning at another time, then the claimant could not avail herself of the argument that she had no warning that her job was in jeopardy. However, in light of the employer's apparent lax compliance with their own policy, it is inherently unfair to penalize the claimant for behavior that the employer had theretofore acquiesced. For this reason, we conclude that the employer failed to satisfy their burden of proving that the claimant's action rose to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated February 11, 2010 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

AMG/ss

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

AMG/ss