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

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| MARNIE OVERLAND<br><br>Claimant,<br><br>and<br><br>JOHN CLARY DDS<br><br>Employer. | : | HEARING NUMBER: 08B-UI-03512<br><br>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, Marnie Overland, worked for John Clary, DDS, as a full-time dental assistant from August 1, 2006 through March 19, 2008. (Tr. 2, 27) Dr. Clary assigned the claimant to a leadership role (Tr. 30, 31), and having trained her (Tr. 42), he expected her to maintain the smooth operation of the office. (Tr. 17, 24) Each day at 7:50 a.m., Dr. Clary held "morning huddles" in which he relayed information and raised any concerns he had with the office. (Tr. 2, 19-20, 28, 36, 48) Ms. Overland sometimes missed these "morning huddles," as did the doctors and other employees. (Tr. 12, 32, 36)

In July of 2007, Dr. Overman joined the office and was the claimant's new supervisor (Tr. 3, 13, 22) while Dr. Clary practiced primarily from the Ames office. (Tr. 24) This was Dr. Overman's first time

being in a practice. (Tr. 31) Both he and the claimant had to get to know each other's ways, as every

dentist had their own way of doing some things. (Tr. 30-31) In September of 2007, Dr. Overman wrote Ms. Overland and the other staff a note expressing his appreciation for their hard work and included bonus checks. (Tr. 25, Claimant's Exhibit A)

In November of 2007, the employer started noting that the claimant was not clocking out over some of her lunch hours, taking extra time for personal errands, and conducting her personal affairs during business hours. (Tr. 3, 13, 15, 53) Most of these lunch occurrences were the result of Dr. Clary's coming in every other Thursday (Tr. 28-29), and as a 'gesture of good will' (Tr. 10-11), he would take employees to lunch where they'd hold a meeting to discuss how the practice was going. (Tr. 28) "… Some of those employees, [including Ms. Overland], had all remained clocked in because they believed that that lunch was a business lunch to discuss business with [Dr. Clary]…" (Tr. 10, 28, 46) When the employer learned about this practice, he put a stop to it during one of the morning huddles (Tr. 28), and Ms. Overland started clocking out for these lunches. (Tr. 10, 29) Dr. Overman talked to her about his concerns over her use of time and behavior with patients. (Tr. 15, 44) However, neither he nor Dr. Clary ever issued any verbal or written warnings to Ms. Overland regarding these concerns. (Tr. 8, 12, 15, 19-20, 32, 35-36, 47, 60)

On or about January 19, 2008, both the claimant and the other employees raised the issue of retirement benefits, which Dr. Clary promised them prior to Dr. Overman's coming on board. (Tr. 33) Dr. Overman reassured them that "[things] were going to stay the same…" (Tr. 33)

On March 12th, Dr. Overman asked the claimant to take dental impressions of a patient (Tr. 4, 18, 37, 41, 55) who had never had any dental work done other than routine cleanings. (Tr. 24, 40) The claimant expected the hygienist, Denise, to be in the room because it was the latter's patient. (Tr. 38, 41, 45) Ms. Overland assumed that Denise had prepped the patient as far as explaining the procedure. (Tr. 38) The claimant did not like doing impressions because the procedure was so uncomfortable for the patient. (Tr. 38) She placed the tray in the patient's mouth (Tr. 3) and "… did the upper impression first… took that impression out… [had] very good suction so… [she gave] it a tug…" (Tr. 38, 50) As Ms. Overland waited for the first impression, she cleaned up the patient and prepared to mix the material for the lower impression. (Tr. 38) As soon as she mixed the material and put in the lower tray, she left the room to get to get Denise to finish the clean up and pull out the lower tray. (Tr. 39) Ms. Overland continued performing the duties she was performing, i.e., fog tests, when Dr. Overman interrupted her to make the impressions. (Tr. 9, 42, 45)

When the claimant left the room, the patient gagged on the apparatus, and another staff member removed the tray. (Tr. 4) Generally, a staff person assists the patient by holding the tray for the patient (Tr. 5), even though there is no written policy that dental hygienists must remain in the room when dental impressions are being done. (Tr. 6, 52, 56) The impressions were inadequate and the patient had to be called back for retakes. It was at this point, the employer heard the patient's complaint that he did not want to return because Ms. Overland did not treat him well and was rough with him. (Tr. 4, 5, 16, Employer's Exhibit 2)

During the following day's 'huddle,' the employer discussed the appropriate and acceptable manner in which to treat a patient; he did not, specifically, direct his concern to or about Ms. Overland's inappropriate handling of the patient the previous day. (Tr. 19-20) The employer also reiterated that staff should never argue in front of patients in reference to other staff member's complaint that the claimant argued with her. (Tr. 17, 18) The claimant was upset because she hadn't gotten a raise or additional retirement benefits. (Tr. 8-9, 21, 47, 61)

On March 19th, the employer terminated the claimant for a number of reasons, the last of which involved her treatment of a patient on March 12th. (Tr. 3, 31)

## 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 was discharged for a number of reasons, the last of which involved her mishandling of a patient. Evidence shows, however, that the claimant had no record of performance issues prior to Dr. Overman's joining the practice. It was several months after Dr. Overman joined the practice that the employer noted her taking extended lunch periods and using work time to perform personal tasks. The claimant denied abusing work time, and offered a cogent explanation for the extended lunch periods that occurred along with other employees who joined Dr. Clary who took them to lunch during his office visits. (Tr. 10-11, 28-29) The employer does not refute this testimony, and the claimant indicated that once she and the others were directed to start clocking out for these lunch meetings, she complied. (Tr. 10, 29)

The record establishes that the employer was tracking the claimant's performance as far back as November 2007. It seems that the employer was laying a foundation to discharge the claimant. (Tr. 21, 22) The employer considered every instance on the Employer's Exhibit 1 to terminate the claimant. (Tr. 22) Although the employer was tracking the claimant's job performance, the employer failed to issue any warnings in the five-month period that they were recording problems. The employer, admittedly, had several talks and discussions with Ms. Overland, but no where in the record does the employer state that she was disciplined with either verbal or written warnings such that she would be on notice that her job was in jeopardy. (Tr. 8, 12, 15, 19-20, 32, 35-36, 47, 60) In fact, most of these talks were reactionary and in passing, i.e., "… more of in the hallway, in between patients… never… a formal sit-down…" (Tr. 15) Many of these talks were directed toward the entire group of employees present at the morning huddles.

As for the final act, the claimant complied with the employer's directive to take impressions of a patient who had never had extensive work done. The employer's argument that she not only failed to proficiently perform this task and hurt the patient, but that she also left the patient alone is not wholly without merit. However, the claimant credibly testified that she was very uncomfortable doing this procedure, which could reasonably be attributable to the fact that she never had any formal schooling, but was trained on the job at the employer's business. (Tr. 42) Her mistaken belief that Denise, a dental hygienist, had already explained the entire procedure to this patient may arguably be poor judgment, however, given Ms. Overland's belief that this patient 'belonged' to Denise, it was not wholly unreasonable for her to make that assumption. (Tr. 38, 41, 45) The claimant's alleged failure to explain the procedure, coupled with his never having had any extensive dental work performed outside of teeth cleaning, could have also contributed to his trauma as to why he perceived the entire process as being rough-handled. The claimant did not intentional cause pain and discomfort to the patient. The employer failed to provide any evidence (affidavit) that the patient did, in fact, gag or choke as a result of the manner in which the claimant handled the procedure. (Tr. 40) As for the claimant's leaving the patient, alone, it was not uncommon according to the claimant's testimony. This was how Ms. Overland had been trained and other dental assistants left patients alone as well, particularly when an assistant worked alone. (Tr. 37, 42-43)

There is no other instance of the claimant's alleged ill-treatment of a patient in this record. Had the employer issued progressive disciplinary measures against the claimant for the other alleged infractions, the outcome of this case might have been different. At worst, the final incident may be considered an isolated instance of poor judgment that did not rise to the legal definition of misconduct. For this

reason, we conclude that the employer failed to satisfy their burden of proving disqualifying misconduct.

## DECISION:

The administrative law judge's decision dated June 2, 2008 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/fnv

## 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/fnv

## ORDER REGARDING RECORD:

The Employment Appeal Board orders that any mention of patients who did not participate in the hearing, found in the transcript is hereby redacted. In general, patients enjoy a privilege for medical records and communications. Iowa Code section 622.10; See Iowa Code section 22.7(2) (medical records of public health provider are not open records). The resident in question did not participate in the hearing and, so far as we can tell, they did not waive any objection to the disclosure of their names. We conclude that redaction of the last names of the patients in this matter is warranted. This redaction does not materially affect the record evidence.

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John A. Peno

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Elizabeth L. Seiser

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AMG/fnv

Monique F. Kuester