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

KIMBERLY K SCHMADEKE	:	
	:	**HEARING NUMBER:** 17BUI-00993
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
KELLY SERVICES USA LLC	:	
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, 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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Kimberly Schmadeke, worked for Kelly Services, USA, LLC from September 14, 2015 through November 28, 2016 as a full-time employee in a long-term temporary assignment at Ruffalo Noel Levitz, which is a call center. (37:00-37:40) The Employer has a policy that prohibits the use of inappropriate or offensive comments involving a person's race, ethnicity, religion, etc., in the workplace for which the Claimant had knowledge. (13:19-14:00; 29:30-29:44) Ms. Schmadeke had difficulty working with a co-worker named Aaron (35:45-35:55) who routinely harassed her (35:15-35:18) by making racially inappropriate comments to her in reference to a group of African-American employees working in the same workplace (10:10-11:07; 36:30-36:35), i.e., "We need to start lynching these people again." (45:41-45:45) The Claimant endured his behavior for approximately two months because she understood that he intended to quit and the discomfort would soon end. (36:00-36:15) Aaron was constantly trying to draw her into his

inappropriate conversations in which she acquiesced on one occasion out of peer pressure (37:42-37:50; 41:00-41:25; 1:05:43-1:06:00) by stating, “If they’re going to act like monkeys, then they should grow bananas.” (45:24-46:40) No one heard his comments or the Claimant’s one comment; nor had anyone ever complained about Aaron’s comments as he expressed them privately between the two of them. And no one complained about the Claimant’s comment. (37:55-38:00; 45:00-45:15; 1:03:33-1:03:35)

At or around the 2nd week of November, Aaron passed the Claimant a post-it note that contained a racially offensive comment in reaction to a group of African-American females who were perceived as being boisterous. (39:10-40:19) Ms. Schmadeke immediately tore up the note; placed it in her pocket; and told Aaron that his actions were wrong. (40:25-40:42) She later retrieved the note, and taped it back together. (40:43-40:48) When it became clear around mid-November that Aaron was not quitting, the Claimant reported her concerns about his behavior to the call center supervisor on November 27, 2016. (38:15-38:40; 41:55-42:06; 42:30-42:37) She also indicated she did not come forward sooner because she feared retaliation from Aaron and she did not feel comfortable knowing she would be ostracized and targeted by them. (41:25-41:35; 42:40-42:46; 48:30-48:35; 1:04:55-1:05:12; 1;13:20-1:14:09) The assignment manager assured her that there would be no repercussions. (42:50-43:16) The Claimant told the manager she could no longer work there because of Aaron’s comments and also showed him the post-it note. (44:10) The manager encouraged her to continue talking in which she also disclosed her comment. (45:28-46:39) The Claimant understood that she might receive a written warning, but did not know that her job was in jeopardy. (49:18-49:24; 1:03:15-1:03:18)

When she returned to work that Monday, November, 28, 2016, the Claimant was terminated from the assignment for violating their zero tolerance policy. (34:16-34:29; 34:52-34:58; 50:19-50:21; 50:39-50:42) Kelly Services also terminated her that same day for making inappropriate comments while on the assignment. The Claimant received no prior warnings or disciplinary actions against her during 2016. (19:10-19:18; 26:55-27:04; 49:15-49:24)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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 she worked in a hostile and tense work environment while assigned at Ruffalo Noel Levitz, particularly during the last quarter in 2016. Her allegations against Aaron, who was a long-term employee of Ruffalo, were consistent with statements made during her Fact-finding Interview for which the Employer did not participate. The Employer was unable to provide with any specificity any other comments the Claimant allegedly made during November of 2016 that led to her termination. (15:01-15:15) In fact, she had no reason to believe her job was in jeopardy as she had been a model employee. (48:42-49:13; 50:10; 57:18-57:42; 1:03:30-1:03:33)

On the other hand, it was only because the Claimant came forward to report another co-worker's ongoing racist behavior that Ms. Schmadeke's own single comment came to light. While we do not condone her behavior, we agree that her comment was against company policy. We also find that her self-reporting and attempt to remove herself from the toxic environment are mitigating factors under these circumstances. (15:44; 57:43-58:12; 1:03:39-1:03:47) We find it credible that the only reason she failed to come forward sooner was because she was trying to save her employment and spare herself an onslaught of further negative behavior from Aaron and his cohorts who were known workplace bullies. Had the Claimant not reported when she did, the Employer would not have known of her inappropriate comment. As soon as she made the comment, she knew it was wrong and when the time came, she reported herself as well. Additionally, there is nothing in this record to establish that Ms. Schmadeke had a history of such behavior while employed here during this employment. We consider this to be an isolated instance of very poor judgement that didn't rise to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated February 23, 2017 is **REVERSED**. The

Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

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Kim D. Schmett

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Ashley R. Koopmans

_____
James M. Strohman

AMG/fnv