

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

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DEBORAH ELSBERRY

Claimant

and

CASEY'S MARKETING COMPANY

Employer

HEARING NUMBER: 18BUI-02912

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**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

**DECISION**

**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, 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, Deborah Elsberry, worked for Casey's Marketing Company as a full-time cook/kitchen helper at the Casey's store in Dayton from 2011 until February 7, 2018. The Claimant's essential duties included stocking the food warmers so that customers could purchase the prepared food. The Employer's written policies required that food items not sold within an hour of being placed in the food warmer be removed from the food warmer and discarded. The policy ensured that customers were presented with fresh and safe food. It also reduced the Employer's risk of liability by preventing the sale of prepared food that had become unsafe due to a decrease in internal temperature. In practice, the Employer made one exception to this "wasting" rule, which involved chicken tenders that would be refrigerated after being removed the warmer and later used for chicken wraps.

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At the start of her employment, Jennifer Miller, the regional store supervisor, told Ms. Elsberry that she could switch out the food in the food warmer 'give or take 10-15 minutes' around the hour. (1:32:18-1:33:02) The Claimant did not go through formal training on the 'Noon and Night Warmer Products' policy (1:33:42-1:33:45); or had to take any other type of food training. (1:35:29-1:35:40) The policy manual containing food safety policies was available for referral. Ms. Elsberry was aware of these policies and generally performed her duties in accordance with these policies.

The Employer issued a couple of written warnings to Ms. Elsberry in 2016: one in January that included a two-day suspension for not removing food items that had been in the food warmer longer than an hour; and the other in November for not monitoring how long food items had been in the food warmer.

On December 7, 2017, the Employer issued a written warning to the Claimant for eating food left on a cutting board after she cut a pizza and for getting into a yelling match with a customer who was upset by her unsanitary "grazing" behavior. The Claimant denied she was 'grazing' and denied she argued with a customer. (1:53:50-1:43:15) The following week (December 12, 2017), the Employer held a meeting with twelve employees, including the Claimant, in which the Employer commented out loud that the Claimant was slow. (50:53-51:10; 1:49:30-1:50:00) Around the beginning of January, Dorothea (assistant manager) told Ms. Elsberry that the Employer had too many full-time people. (1:50:08-1:50:33)

On January 20, 2018, Anthony 'AJ' Patterson was promoted from kitchen cook to food service leader. (55:45) Ms. Elsberry heard that he was going to clean house. On February 7, 2018, Mr. Patterson confronted the Claimant about video surveillance he viewed in which he said he saw Ms. Elsberry removing a "hot cup" of potato wedges that had been in the warmer for 65 to 70 minutes. (1:12:04) He told her the video showed her walking around a counter and transferring the potato wedges from the "hot cup" to a food "boat" where she topped the wedges with cheese sauce and bacon bits, i.e., loaded potato wedges. (1:10:50-1:11:25) The Claimant then returned the modified food item to the food warmer for sale to customers. (1:05:45-1:06:30) When he questioned her about 'recycling' the potato wedges, she denied that the wedges had been in the warmer over an hour. (1:08:53-1:10:00; 1:39:15; 1:40:00-1:40:39)

Mr. Patterson conferred with Ms. Gustafson and then notified Ms. Elsberry that she was discharged for violating the Employer's food handling and food safety policies. The Claimant believed she was terminated for reasons (full-time with benefits; her age, and being too slow) other than the potato wedges' allegation. (1:48:30-1:49:17; 1:49:29-1:50:05)

## **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.

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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 a long-term employee for whom the record contains no evidence that she had food safety issues throughout the majority of her employment. While the Employer argues that the hour rule is hard and fast, Ms. Elsberry offered testimony that she was told at the beginning of her employment by the regional store manager that she had a 10-15 minute window in which to change out food in the warmer. The Employer did not refute this testimony. As for the final act that caused her job separation, it had been more than a year since she last received a warning regarding this type of food safety violation. In addition, the Claimant vehemently denied that the potato wedges had been in the warmer beyond an hour's time. Ms. Elsberry refuted that the video surveillance she saw established that the wedges were in the warmer as long as alleged, as the picture she saw was a still picture. The Employer failed to present the video as evidence to substantiate their allegation against her. Based on this record, we conclude that the Employer failed to satisfy their burden of proof.

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**DECISION:**

The administrative law judge's decision dated April 3, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying misconduct. Accordingly, she is allowed benefits provided she is otherwise eligible.

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Kim D. Schmett

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James M. Strohman

**DISSENTING OPINION OF ASHLEY R. KOOPMANS:**

I respectfully dissent from the decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Ashley R. Koopmans

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

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