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

MARCIA K FREDERICK

Claimant,

and

CASEY'S MARKETING COMPANY

Employer.

HEARING NUMBER: 09B-UI-04621

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, Marcia K. Frederick, worked for Casey's Marketing Co. from July 2002 through February 16, 2009. On June 28, 2005, the claimant became a full-time assistant manager. (Tr.2, 14) During her training for this position, the employer went through a large pamphlet with the claimant for which she signed in acknowledgement of understanding on the policies. (Tr. 6)

On November 18, 2008, the employer issued a corrective action warning to the claimant for not following proper procedure in counting cigarettes (Tr. 5, 19-20, 34, Exhibit 1) Ms. Frederick, who was relatively new at conducting the cigarette audit, conducted the audit with Amy Strolley who had done the books for the majority of the month. (Tr. 20-21) When the cigarette count was way off, the

claimant attempted to get assistance from Sherry to no avail. (Tr. 20-21, 30, 36) No other employee was faulted for the mishap. (Tr. 21) Mr. Frederick had done the books only seven times out of the entire month. (Tr. 21-22)

On Saturday, February 7, 2009, the claimant experienced a "… real hectic day." (Tr. 12, 17, 19) A busload of 48 people came in and the claimant along with only one other employee was available to assist customers. (Tr. 15) It was difficult to gain access into the cash registers, and consequently both credit and debit cards were rejected. The computers were slow and Ms. Frederick needed to wait for assistance from the help desk at the main office, which was delayed by several hours. (Tr. 15, 26) Additionally, the gas pumps were not functioning properly. (Tr. 15) Ms. Frederick was responsible for conducting the cigarette audit that day as well. (Tr. 4, 13, 16) Cigarettes were located below and overhead of the counter as well as in the cupboards and office. (Tr. 15-16)

The claimant was unable to dedicate her complete attention to conducting the audit. She started her cigarette count and continued between helping customers. (Tr. 15, 26) Ms. Frederick developed her own system of counting that allowed her to pick up counting where she left off. (Tr. 15, 19, 27, 29) She completed only half the audit before being relieved by Amy Nossick who took over the cash register. (Tr. 15, 17) It took the claimant until 5:00 p.m., three hours past the end of her shift to complete the count. (Tr. 19, 26)

An employee reported to the employer the following Monday their suspicion that Ms. Frederick did not properly count the cigarettes. (Tr. 4, 10) The employer reviewed the videotape the next day (Tr. 13) and saw what appeared to be Ms. Frederick's counting only two rows of cigarettes when there were probably more than 20 rows. (Tr. 2-3, 10-11) The employer allowed the claimant to view the video. (Tr. 16) She noted that only her counting of two rows was visible on the tape. (Tr. 17, 25, 32) The employer believed the claimant falsified the cigarette audit and consequently terminated her. (Tr. 2, 14, 24)

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 record establishes that Ms. Frederick received only one written warning (November 2008) during her seven-year tenure and had an otherwise good employment history. ((Tr. 5, 19-20, 34, Exhibit 1) The claimant admitted having had very little experience in conducting audits back in November of 2008, which prompted her initiating her own counting method so as not to lose track of her figures while still having to deal with customers. (Tr. 15, 19, 29) It was only several months later (February 2009) that the claimant was accused of falsifying the cigarette count during an audit.

Although the employer alleges that Ms. Frederick intentionally falsified the cigarette count in February (offering purportedly corroborating testimony with regard to the video), the claimant vehemently denies this allegation. Both parties agree as to what can be seen on the video, i.e., the claimant counting cartons underneath the counter (Tr. 10); however nothing on the video is corroborative that the claimant failed to conduct a total count. The claimant's method of counting would not necessarily appear on video as the employer would normally expect to see. (Tr. 11, 17, 25, 32) Rather, Ms. Frederick maintains her method was to multiply the filled rows as opposed to 'fingering' through cigarette packs to obtain a count as other assistant managers did. (Tr. 11)

Lastly, the employer failed to provide the alleged 'someone' who 'suspected' as a firsthand witness to refute the claimant's testimony. (Tr. 10) For this reason, we attribute more weight to the claimant's version of events that she did not falsify the cigarette count. At worst, her error in the count was an unintentional miscalculation that does not rise to the legal definition of misconduct. After all, the employer did not refute Ms. Frederick's testimony regarding the day's calamity (Tr. 12, 17, 19), which may have contributed to the mistake in the audit. Based on this record, we conclude that the employer failed to satisfy their burden of proof by a preponderance of the evidence.

DECISION:

The administrative law judge's decision dated May 19, 2009 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