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

ANGELA R DIERS	**HEARING NUMBER:** 18BUI-06125
Claimant	
and	**EMPLOYMENT APPEAL BOARD DECISION**
DEXTER LAUNDRY INC	
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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two 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, Angela R. Diers, worked for Dexter Laundry, Inc. from September 2, 2014 through May 4, 2018 as a full-time production worker. She previously worked as a seasonal worker for the summer of 2014 in which she signed the Employer’s collective bargaining agreement and harassment policy on July 28, 2014. (38:45-38:52; 55:54) That policy defined harassment, in part, as “verbal or physical conduct that degenerates or shows hostility towards an individual or race due to national origin, …that has the purpose or effect of creating an intimidating, hostile or offensive work environment…or has an adverse effect on an individual…” (56:01-58:07) Such behavior is grounds for termination. (Exhibit 1, numbered pp. 37-38)

On May 4, 2018, an employee named Lindsey danced and sang about as she delivered parts. Ms. Diers asked her what she was doing to which Lindsey mentioned the Cinco de Mayo holiday. The Claimant commented that she hated ‘f*cking’ Mexicans. (45:05; 51:48; 54:29-54:35) Lindsay was obviously offended by the Claimant’s comment for which Ms. Diers apologized “if Lindsay didn’t like what she said…,” but reiterated she was not a Mexican fan. (45:17-45:24) Lindsay reported her behavior to the Employer who, in turn, spoke to several other witnesses who verified Ms. Diers did make the comments. The Employer also spoke to the Claimant who was not readily forthcoming about the matter.

It's not unusual for employees to cuss or make other inappropriate comments in the workplace; however, this was the first time the Claimant knew of any employee bringing it to management's attention, and management taking action. (46:06-46:13) The Claimant was suspended pending further investigation in which the Employer indicated he would "follow-up with [Ms. Diers] in the next few days by phone or letter to let [her] know [her] employment status…" (Exhibit 1, B-7) Ms. Diers had already received five disciplinary actions against her in which she was warned each time that a further infraction could result in termination. (Exhibit 1, B-1to B-6) The Employer has a progressive disciplinary policy that provided five disciplines result in termination. (Exhibit 1, p. 38)

On May 8, 2018, the Employer terminated the Claimant for violating company policy against workplace harassment and creating a hostile work environment. (10:36; 12:50)

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 findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Employer's version of events. The Employer testified that the Claimant was provided with work rules that prohibited harassment or behavior that created a hostile work environment to the Claimant, who admitted receiving both the union agreement as well as several other documents provided to her regarding company work rules. Thus, she is attributed to having knowledge of the Employer's policies and work rules.

We find the Claimant's denial of knowing or understanding the meaning of harassment or hostile work environment not credible. Any reasonable person would know that uttering such a vulgar and negative comment about a nationality of people could foreseeably cause 'dis-ease' and hostility in the workplace, which would undermine the Employer's interests. Ms. Diers instantly knew she created a hostile environment when she admittedly witnessed Lindsay's reaction, which prompted her to conditionally apologize, but then repeat her verbal disdain for a people belonging to a particular national origin. The Claimant's comments fell squarely within the type of behavior the Employer's work rules specifically prohibit. Her clarification that she only meant 'illegal' Mexicans does not absolve her of culpability; nor did her apology mitigate her comments that were made in the workplace during work hours on May 4th, 2018, specifically in violation of the Employer's policy against harassment and hostile work environment. Although it may be arguable that some of her past infractions may be too remote for consideration, we find the final act, alone, to be so egregious as to constitute "…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…" See, 817 IAC 24.32(1)(a). Based on this record, we conclude the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated June 20, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying reasons. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Employer 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 Employer 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

James M. Strohman

AMG/fnv