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

BETTE J HERRIG	:	
Claimant,	:	**HEARING NUMBER:** 14B-UI-09201
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
KINSETH HOTEL CORPORATION	:	
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. 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Bette Herrig (Claimant) worked as a full-time sales manager for Kinseth Hotel Corporation (Employer) from June 3, 2009 until she was fired on July 28, 2014. The Claimant received a copy of the Employer's Internet policy that informed her she could not use the Employer's computer or Internet for personal use. The Claimant was aware that an employee had been terminated for personal use of the internet.

The Claimant used the Employer's computer to check on items she listed to sell on a resale website, to check her bank account, to shop, and to respond to résumés she had sent to other employees. The Employer first learned about the extent the Claimant used the Employer's computer for personal reasons in early July 2014. On July 15 the Employer talked to the Claimant and told her to curtail her use of the Employer's computer for personal reasons. The Claimant explained that she had to look at her bank account every day because she was a victim of identity theft. The Employer suggested she go to the public library and use computers at the library.

After the July 15 discussion, the Employer checked the Claimant's internet usage history and discovered she still used the Employer's computer to check her bank account, to visit a resale site, to shop at Younkers, and to send some personal emails through her Gmail account. The Employer also discovered the Claimant daily deleted her browser history on her computer. The Employer concluded the Claimant tried to hide the fact she was still using the Employer's computer for personal reasons. On July 24 the Employer suspended the Claimant after discovering she still used the Employer's computer for personal reasons.

Between July 24 and July 28 the Employer conducted an investigation and discovered other transgressions by the Claimant. On July 28 the Employer discharged the Claimant for her infractions including her internet usage and browser history violations. The internet usage infractions were a *but for* cause of the decision to terminate.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2014) 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.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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 key to this case is the question of internet use. Even if the Employer took into account all her issues when terminating not all the incidents must be misconduct to be disqualifying. There are two things required for a disqualification based on misconduct. The Claimant must commit misconduct, and the termination must have been caused by the misconduct. There is no requirement that the termination be the sole cause of the misconduct. *Compare* Iowa Code §96.5(2) *with* §95.4(5)(b)("solely by reason of"); §96.19(18)(a)(5)(same), Code §96.7(2)(a)(2)("solely due to"); §96.14(3)(f)(5)(same), Code §96.9(3)("solely for"); §96.13(1)(same); Code §96.19(16)(g)("solely because of"). What is required is that misconduct be a *but for* cause of the termination. *Bridgestone/Firestone, Inc. v. EAB*, 570 N.W.2d 85, 91 (Iowa 1997).

If there are two *but for* causes of the termination only one of them needs to misconduct to disqualify – a claimant need not be disqualified twice. *See Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984)(finding decision to ambulate that factored into discharge not to be misconduct, but still disqualifying based on attendance). Also the mere fact that the Employer would not have terminated based on an act does not mean, as a matter of law, that that act is cannot be misconduct. The issue of misconduct is a legal one, and not dictated by the opinion of either party. *See Gaborit v. Employment Appeal Board,* 743 N.W.2d 554 (Iowa App. 2007).

If the only cause which is misconduct is also the one which is remote in time, then the "current act" doctrine may very well mean that no disqualification can be imposed. On the other hand, any infractions that factor into the final discharge decision at all may be considered when determining the *magnitude* of the final act. That is an act which by itself may not be misconduct, can rise to the level of misconduct when the employee's history of infractions is taken into account. This is the "last straw doctrine" and is about magnitude, not causation. 871 IAC 24.32(8)(" past acts and warning can be used to determine the magnitude of a current act of misconduct"). We thus look to the Claimant's final act that precipitated the discharge and ask was it a *but for* cause of the termination, and if so, whether given her history of infractions it rises the level of misconduct.

Here the Claimant's violation of the internet used policy was clearly a *but for* cause of the termination, in as much as, had she not violated this policy she would not have been terminated. This being the case all that remains is misconduct *vel non.* The Claimant here was aware of the internet use policy. Although the Claimant argues she was unclear on the policy, once she was warned it was clear to her that her usage was excessive and must be curtailed. Indeed, the fact that the Employer would not permit checking the bank account even with the identity theft explanation makes clear that the Employer intended to be strict about the level of usage the Claimant had. Yet she did not only did not curtail usage but instead tried to conceal it. Even a single instance of covering-up a workplace transgression can itself be misconduct. *White v EAB* 448 N.W.2d 691 (Iowa App. 1989). We thus find that the internet usage after being warned, plus the attempt to conceal such usage, are *each* themselves sufficient to rise to the level of misconduct. The Claimant was thus terminated for misconduct and is disqualified for that reason.

DECISION:

The administrative law judge's decision dated October 6, 2014 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Kim D. Schmett

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Samuel P. Langholz

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

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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Ashley R. Koopmans

RRA/fnv