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

TIMOTHY ENGLAND Claimant, and SEARS ROEBUCK & CO Employer.	:	HEARING NUMBER: 09B-UI-03742 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: 85,5-2-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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Timothy England (Claimant) was employed by Sears Roebuck & Co. (Employer) as a full-time product specialist from November 10, 2003 through the date of his discharge on February 6, 2009. (Tran at p. 2-3; p. 8; Ex. 3).

Any disrespect of a customer by an employee, including overt rudeness and disrespectful comments when talking with the customer, violates the Sears Code of Business Conduct. (Tran at p. 3; p. 8-9; Ex. 1). The Claimant was given a performance plan for improvement on November 28, 2008 for inappropriate conduct towards a co-worker. (Tran at p. 3-4; p. 9; Ex. 2). He was advised that further incidents could result in his discharge. (Tran at p. 4; p. 8-9; Ex. 2).

On January 26, 2009 a call from an irate customer was transferred to the Claimant. (Tran at p. 5; p. 10; p. 12). The Claimant has experienced problems with being heard clearly when calls are transferred. (Tran at p. 10; p. 11). On this occasion the customer had trouble hearing the Claimant and the Claimant raised his voice. (Tran at p. 10). The Employer has failed to prove that the Claimant spoke to the customer in a disrespectful manner. Specifically the greater weight of the evidence does not establish that the Claimant said "I do not have time for this. I am letting you go. Bye!" or anything similar in tone. (Tran at p. 10-11; p. 12). Supervisor Brian Chadwick reported to the Employer that he overheard the Claimant on a telephone call on January 26, 2009 in which he was yelling at a customer and that he had been rude to the customer. (Tran at p. 5-6). This report was made on January 26th. (Tran at p. 5-6). Based on this information the Employer terminated the Claimant's employ on February 6, 2008. (Tran at p. 3). Had the Employer not believed that the Claimant had spoke to the customer in an inappropriate manner on January 26th the Employer would not have terminated the Claimant. (Tran at p. 3).

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: 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.

"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).

Weight of Evidence

In making our findings we have had to weigh some conflicting evidence. The key evidence from the Employer is hearsay. (E.g. Tran. at p. 5; p. 6). We do not automatically find that hearsay will be outweighed by live testimony. *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005); *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Yet the fact that the Employer chose to rely entirely on hearsay is a significant factor we must take into consideration when determining if the burden of proof has been carried. The raised voice by the Claimant has been adequately explained by the Claimant. The issue is thus the *content* of the phone call. If we are to assess the tone of the conversation, with the raised voice explained, we need as much detail on the exact contents of the conversation as we can get. Mr. Chadwick's testimony is critical on this issue, yet the Employer did not call Mr. Chadwick, for reasons that are not explained. The Claimant questioned Mr. Chadwick's ability to accurately observe the Claimant's side of the conversation. This is a subject ripe for cross-examination – but since the witness did not testify he could not be cross-examined. Also the log maintained by Mr. Chadwick was not introduced into evidence. Since we find the testimony of the Claimant to be credible on this point, since the need for precision is high, and since the Employer's hearsay evidence is difficult to credit, we have weighed the evidence in favor of the Claimant. *C.f. Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990)(factors in assessing reliability of hearsay includes availability of better evidence and the need for precision). The Employer has failed to prove by a greater weight of the evidence that the Claimant in fact spoke to a customer in an "unempathetic" or otherwise inappropriate manner on January 26th. As a result the Employer has failed to prove that the Claimant was discharged for misconduct.

DECISION:

The administrative law judge's decision dated April 6, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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 Kuester

RRA/fnv