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

DONNA C DEPPE	:	
	:	**HEARING NUMBER:** 16B-UI-11756
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
DAVID W DAVIDSON DDS	:	
	:	
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, 96.3-7

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, Donna Deppe, worked for David W. Davidson from 1999 through October 3, 2016 as a full-time dental assistant. (16:29-18:23; 18:50-19:04; 1:09:09-1:09:40) Approximately one year and a half ago, the Employer implemented a new procedure that required dental assistants to take an x-ray of a crown after its permanent placement. (33:15-34:00; 39:15-39:31; 1:20:47-1:20:58)

The Employer explained the reasons for this change, which the Claimant and other dental assistants initially questioned. (39:43-39:49; 39:57-40:20; 59:30-59:40; 1:15:14-1:15:47) Ms. Deppe understood that they were being required to take this x-ray to send to the insurance company as proof that a crown had been placed in order for the dentists to get paid for the same. (1:13:45-1:14:19; 1:17:30-1:17:44) The Claimant complied with the new policy and as a result never had to recall a patient. (1:13:53; 1:14:33-1:14:43; 1:18:10-1:18:17)

On September 28, 2016, Ms. Deppe heard from another dental assistant, Sara R., that Mary Ann said their dental office was being investigated by the insurance company. (1:18:53-1:19:20) The Claimant subsequently went to the front desk to ask Mary Ann about what she'd heard. (20:37-21:20; 28:23-28:31; 1:19:21-1:19:35; 1:20:21-1:20:24) Mary Ann then called Cathy over to ask her about the matter to which Cathy, in turn, indicated "no' not that she knew of…" (1:19:36-1:19:45) Cathy then asked Tracy W. to which Tracy responded the same way. (1:19:46-1:19:54)

The Claimant believed this rumor could be true because for the last year and half, the Employer was required to take x-rays *after* a crown had been seated, which other offices didn't do. (26:00-27:20; 1:20:43-1:21:00)

On September 29, 2016, the Employer called Ms. Deppe into the office and suspended her pending further investigation based on their accusation that she engaged in slander against the Employer. (27:35-27:56) Based on the results of the investigation, the Employer terminated the Claimant for engaging in conduct that was slanderous to the Employer's reputation. (19:14-19:28; 19:44-19:58; 43:15-43:32; 1:04:35-1:04:40; 1:09:57-1:10:32) The Claimant had knowledge of only one verbal warning (in 17 years) from the Employer regarding her use of profanity in reaction to breaking an instrument in the workplace. (1:11:20-1:11:55; 1:22:27-1:22:28)

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 Claimant's version of events.

Ms. Deppe was a long-term employee who admittedly received only one verbal warning in her nearly two decades of employment for an inappropriate outburst that occurred after she accidentally broke an instrument. As for the Employer's allegations that she received several progressive write-ups, the Claimant denied this testimony and the Employer failed to provide any documentation to support these allegations. In addition, the Employer admitted that the reason Ms. Deppe was terminated was solely based on the 'slander' allegation, and nothing more.

The Claimant vehemently denied that she ever initiated any statements that the office was under investigation, as she was an employee who would never have been privy to that kind of information in the first place, nor would she pass such statements on based on her longtime loyalty to Dr. Davidson. (1:20:35-1:20:40; 1:21:03-1:21:06; 1:22:54-1:23:22) She admitted oftentimes wondering about whether the rumor had been true based on the Employer's change in policy a year and a half ago. (1:20:47-1:20:58) However, wonderings do not translate into passing out false information when the Claimant merely asked questions about statements that had been made to her. Once the policy changed, Ms. Deppe complied with the change, regardless of any questions she might have had. While it is possible that her mere inquiry triggered further inquiries around the office, it was clearly not the Claimant's intention to harm the Employer by asking a question amongst her peers. At worst, her inquiry may be considered an isolated incident of poor judgement that didn't rise to the legal definition of misconduct. Based on this record, we conclude that the Employer failed to satisfy its burden of proof.

DECISION:

The administrative law judge's decision dated November 15, 2016 is **REVERSED**. The Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided she is otherwise eligible.

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Ashley R. Koopmans

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James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

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

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Kim D. Schmett

AMG/ss