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

TESSA A ROBERSON	:	
	:	**HEARING NUMBER:** 15B-UI-03602
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
HY-VEE 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: 96.5-2A

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:

Tessa Roberson (Claimant) worked for Hy Vee (Employer) as a part time cashier/associate from September 3, 2014 until she was fired on February 23, 2015. She transferred to the Clarinda store on October 9, 2014.

During her four months at the Clarinda store the Claimant had run-ins or confrontations with managers and coworkers besides K.J. On October 10, 2014 the Human Resource Manager, Brooke Alloway, had spoken to the Claimant about treating co-workers with respect. The Claimant had been yelling from her cash register and a co-worker had told her that she should use the intercom, and the Claimant rolled her eyes and displayed an attitude of disrespect to the co-worker. The Claimant was written up on January 26, 2015 for treating a manager in a disrespectful manner. She had yelled at a manager while in a public area, and at the store manager in his office. On February 14, 2015 the Claimant was verbally warned because the Claimant confronted the kitchen manager in front of others, including customers, by loudly proclaiming that she didn't have to listen to him, and by cursing him. During the weekend of February 14, 2015 while at the front end of the store the Claimant yelled at high school girl and made her cry.

On February 19 the Claimant was speaking with K.J., a new employee who had just started as a cashier/associate on February 4. The Claimant told K.J. that her boyfriend's mother knew K.J.'s sister and K.J., and that the Claimant's boyfriend's mother had told the Claimant a lot of things about K.J. After the first conversation, K.J. moved to the end of a bakery aisle to straighten up shelves. While she was there, the Claimant spoke very loudly across the aisle from her cash register and asked K.J. if she was married. K.J. said "no." The Claimant then in the same loud voice asked K.J. if she 'had a boyfriend." K.J. said "no." The Claimant then said with a smirk on her face that she knew something about K.J. but she was not going to tell anyone. K.J. was offended by the questions and the fact that other employees and customers could hear them and her answers. K. J. did not think the Claimant was joking or that her questions and comment was funny or amusing. Later that night K.J. complained to the manager on duty that she believed that the Claimant was trying to intimidate her or harass her due to her sexual orientation.

On February 23 the Claimant was fired over the incident of February 19 in the context of history at the Employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) 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 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 have found credible the evidence, both live and hearsay, showing the Claimant's pattern of treating her co-workers, and members of management, with disrespect.

An employer has the right to expect decency and civility from its employees. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). While a single act of rude or disruptive behavior is not ordinarily misconduct, repeated acts following warnings, or coaching, certainly can be. The law specifies that prior bad acts may affect the determination of misconduct:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); *accord Johnson v EAB* 585 NW2d 269 (Iowa 1998); *Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB,* 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985).
Under this rule, even if a final act is, in isolation, insufficient to constitute misconduct it can rise to that level when the prior bad acts are used to enhance the magnitude of the latest act. Further, past instances of discipline, like a suspension or a final warning, can make any further incidents much more serious than they would otherwise be. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984). In short, the Employment Security Law recognizes the concept of the "straw that broke the camel's back." *Ray v. EAB*, 398 N.W.2d 191, 195 (Iowa App. 1986).

The Claimant's final conduct - which we find to be an intentional attempt to disturb her co-worker by referring to her sexual orientation in a loud and public way - was not so *explicit* that by itself it would be misconduct. But this Claimant had been disrespectful before, and been warned. In this the case is similar to *Greene v. Employment Appeal Board*, 426 N.W.2d 659, 661-662 (Iowa App. 1988). There the Court was faced with four instances of "failure by Greene to communicate effectively with others as a result of his being inattentive to their concerns or reacting inappropriately..." *Greene* at 662. The Court stated that the miscommunication was not intentional, but noted that repeated negligence can be disqualifying and that Mr. Greene had been warned. Based on this the Court ruled "the repetition of this unintentionally careless demeanor constituted misconduct…" *Id.* Here the Claimant has excuses no more compelling that Mr. Greene's argument that he could not help his own personality and unintentional demeanor. In fact the Claimant's disturbing and disrespectful behavior was not unintentional. But as in *Greene* the Claimant's behavior did not *always* involve blatant acts of profanity or insubordination. Yet no less than in *Greene* the Claimant's behavior was repeated, and in the face of management confrontation with the Claimant over how she treated her co-workers. The bottom line is that you cannot choose to mistreat your co-workers and superiors after repeated warnings and hide behind the idea that any *one* instance of mistreatment was not so

bad. As in *Greene* the last straw doctrine applies and by the time the Claimant engaged in her final act of intentionally trying to disrespect a co-worker there were plenty of straws to make that final one rise to the level of misconduct. While this conclusion would hold even if we were to find that the Claimant was merely negligent, as in *Greene*, we do find that the Claimant knew what she was doing and that her mistreatment of co-workers and management was intentional.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated June 3, 2015 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".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Kim D. Schmett

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James M. Strohman

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