

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

EILEEN M HAINES

Claimant,

and

HY-VEE INC

Employer.

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HEARING NUMBER: 08B-UI-02181

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

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

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member dissenting, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

Elizabeth L. Seiser

Mary Ann Spicer

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The claimant was discharged for sticking her tongue out at co-worker. The claimant testified that she did so in a joking manner, not meaning to harass the co-worker.

She certainly had no idea her behavior would cause her termination. The employer allegedly received a complaint from both the co-worker and a customer, but failed to produce either person at the hearing.

The claimant was situated in the back portion of the kitchen with her back toward the front of the kitchen. She was facing her co-worker with her back to the counter and playfully or jokingly stuck out her tongue. She had no intention of harming either the co-worker or the employer. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For these reasons, I would conclude that the claimant's action did not rise to the legal definition of misconduct. Benefits should be allowed provided she is otherwise eligible.

John A. Peno