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

TOSHA R HARRIS	:	
	:	**HEARING NUMBER:** 10B-UI-06822
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
ROSS HOLDINGS LLC	:	
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 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, Tosha R. Harris, was employed by Ross Holdings, LLC from May 26, 2009 through April 7, 2010 as a part-time telephone sales representative. (Tr. 2, 7) In this line of business, "…the tone…and the verbiage that [a telephone representative] uses is very important for the longevity of…programs with…clients." (Tr. 3, 6) The claimant generally worked in programs that involved survey work in a department within the company. (Tr. 9)

On March 24, 2010, Kristina Kennedy wrote up the claimant for "…being negative on the calling floor…" (Tr. 3-4, 16, 18-19) Ms. Harris did not believe that Kristina had any authority to write her up so she proceeded to discuss the matter with Shannon Schmidt (Director of Operations). (Tr. 19) The

employer advised the claimant to maintain a positive attitude on the floor because a failure to do so could lead to termination. (Tr. 4) The employer did not issue any written warning for the claimant to sign and reassured the claimant that she would take care of the matter. (Tr. 19-21)

The claimant was on jury duty selection on April 6th, which caused her to miss the training for the new program that started the following day. (Tr. 8, 11) On April 7th, 2010, Ms. Harris returned to work and received a 'rough overview' of the new program. She received her first call, which she was not used to handling, as this program required all calls to be transferred to the client company. (Tr. 8) The caller was a very irate man who was "…upset with the current energy company…" (Tr. 8-9, 10) The claimant was unsure how to handle his complaint. Ms. Harris turned to her supervisor, Kristina Kennedy (Tr. 17), for assistance, but she was busy at another post. The claimant then explained to the angry man that she had no control over the matter, but that she could transfer his call to someone who could help him. (Tr. 9, 10-11, 13, 17-18) At the end of the call, Shannon Schmidt (Director of Operations) called her into the office because she, alone (Tr. 17), had monitored Harris' call. (Tr. 7, 14, 15, 16, 17) Ms. Schmidt accused the claimant of being rude to the customer whom the employer believed was angry because he was on a 'Do Not Call List'. (Tr. 4-5, 8-9, 11, 12, 15, 16) The type of call the claimant received was considered exempt from the 'Do Not Call List.' (Tr. 9) Ms. Schmidt had Ms. Harris sign a monitor form to which the employer promptly completed the form and placed it in the claimant's personnel file. (Tr. 14) The claimant did not get to review the taped phone conversation between her and the angry man. (Tr. 9) The employer terminated Ms. Harris for being rude to a customer. (Tr. 4, 16)

REASONING AND CONCLUSIONS OF LAW:

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.

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 employer and eyewitness testified that the claimant was rude on a call when the customer said he was on 'don't call list'. The claimant denies the accusation. The employer submitted no evidence to substantiate their case.

The record establishes that Ms. Harris was discharged for allegedly being rude and not following procedure during a customer call on April 7th, particularly in the aftermath of receiving a final warning back on March 24th. Yet, the claimant did not know that her job was in jeopardy as the employer so argues. Instead, the claimant refutes that she ever received any written warning on March 24th, as she understood from leaving the meeting that day that Ms. Schmidt was 'taking care of it", i.e., removing the supposed write up made by Ms. Kennedy. (Tr. 17)

As for the final incident, Ms. Harris provided a cogent explanation for why she 'mishandled' the call. She was essentially unfamiliar with the proper procedure because she was unable to attend a training session due to being on jury duty the previous day. Her failure to properly handle the call was not due to rudeness; rather, her awkwardness at having had no prior experience on this type of call and having to deal with a very irate customer. Ms. Harris attempted to get advice from her supervisor as she had done in the past on previous programs, but was unable to secure additional assistance because her supervisor was busy at another spot. (Tr. 17) She acted in good faith when she explained to the irate customer that she could transfer his call to the energy company for further assistance. (Tr. 9, 10-11, 13, 17-18) She provides credible testimony that this was not a 'do not call list' circumstance, which she knew how to handle.

The employer argues that two people, along with a monitor form (immediately completed after the call) corroborate the claimant's alleged negative behavior. However, the claimant denies that anyone else

monitored the call other than Ms. Shannon. As for the alleged monitor form that the claimant signed, the employer failed to submit this document at the hearing to corroborate their allegation. Additionally, the employer failed to provide the claimant's immediate supervisor (Kristina Kennedy) whom the employer alleges was also a party to the monitoring. We also note that the employer failed to produce the tape to prove the allegedly negative tone and conversation content used by Ms. Harris.

871 IAC 24.32(4) provides:

> *Report required*. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established…

We conclude that the employer failed to satisfy their burden of proof as the record lacks substantial evidence to support their case.

DECISION:

The administrative law judge's decision dated June 29, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. 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 F. Kuester

AMG/fnv