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

ASHLEY R THOMAS Claimant and **PELLA CORPORATION** Employer	:	**HEARING NUMBER:** 18BUI-11279 **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: 96.5-2-A

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:

Ashley Thomas (Claimant) worked as a full-time factory employee from February 10, 2014, until she was fired on October 11, 2017. The Employer has a respectful workplace policy which the Claimant was aware of.

In early September 2017, co-worker Benita Powell made a complaint to the Employer that the Claimant was not properly locking out a machine. The Employer did not discipline Claimant for this incident. Claimant testified she did not have any issues with Ms. Powell, but we do not find this testimony credible. On September 26 the Claimant was warned for violating the Employer's respectful workplace policy. The Claimant had cursed her supervisor on September 26 saying among other things that she was "the worst fucking manager ever…"

On October 7, 2017, during the Claimant's scheduled shift, the Employer received a complaint that the Claimant was moving tags on windows to make it difficult for Ms. Powell to scan the tags. The tags are scanned to verify a customer's order. The team coordinator who received the complaint told the Claimant to stop moving the tags and the Claimant responded "They're just tags." She stopped moving them for a short time but then recommenced moving the tags. Ms. Powell then came to Ms. Arellano in tears and frustration over the moved tags. Ms. Arellano then went to the line in question to investigate. Linda Carpenter reported to Ms. Arellano that the Claimant had said she was moving the tags because she "didn't like that fucking bitch," indicating Ms. Powell. Ms. Arellano then went to the Claimant's line and overheard the Claimant saying that she was moving the tags in order to get back at Ms. Powell for "narcing," i.e. reporting the Claimant.

On October 7, 2017, the Claimant was moving tags on the windows just as described in the complaint. This resulted in lowered output while Ms. Powell had to search for the misplaced tags.

The Employer conducted an investigation on Monday October 9. The Employer interviewed multiple employees, including Benita Powell, Linda Carpenter, Eric Hahn and Mike Cook. Mr. Cook confirmed that the Claimant had admitted to moving the tags out of retaliation, and that the Claimant had been moving tags in unusual ways to make things difficult on Ms. Powell. Ms. Carpenter also reported that the Claimant had admitted to moving the tags to get back at Ms. Powell. After some difficulty caused by the Claimant's anxiety, the Employer also eventually got the Claimant's information. After speaking with the Claimant the Employer made the determination that Claimant had been moving tags to make it difficult for Ms. Powell. The Employer also made the determination that the reason Claimant was trying to make it difficult for Ms. Powell was because of the safety complaint Ms. Powell had made. The Employer has proven by the greater weight of the evidence that the Claimant was in fact moving the tags in retaliation for Ms. Powell's complaint.

During testimony the Claimant denied talking to Mr. Cook and Ms. Carpenter on October 7, 2017.

REASONING AND CONCLUSIONS OF LAW:

We affirm the Administrative Law Judge's evidentiary rulings. As far as the hearsay concerning what was told to the Employer during the investigation it is, of course, extremely common that an employer presents its evidence of alleged misconduct through its management and human resource staff. Appearing at such hearings is a routine job requirement for such persons, and thus it is routine to find them presenting the employer's investigative evidence at hearing even though they were not personally involved in the events leading to the job separation. This being such a common business practice is relevant to whether a reasonably prudent employer is "accustomed to relying" on such hearsay in conducting serious affairs. *See Ames Comm. School Dist. v. Cullinan*, 745 N.W.2d 487, 494 (2008)(teacher termination case citing as indicia of reliability "administrative reports and memoranda, while hearsay, had been drafted as part of the school administrators' official responsibilities"). We find that the hearsay offered here is exactly of this sort. Furthermore Ms. Arellano's testimony that she heard the Claimant admit she was moving the tags and doing so to get back at Ms. Powell is not hearsay. I. R. Evid. 5.801 (statement of party not hearsay). This non-hearsay corroborates the hearsay statements wherein Ms. Arellano and Ms. Grandgenett relate what was said during the investigation by Ms. Carpenter and Mr. Cook. (Again since the statements by the Claimant made *to* Cook and Carpenter are not hearsay, this is not a case of double hearsay). The hearsay proffered by the Employer meets the standard of admissibility under Iowa Code §17A.14.

Iowa Code Section 96.5(2)(a) (2018) 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).

An employer has the right to expect decency and civility from its employees and that they not harass one another. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984); *Meyers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Crane v. Iowa Dept. of Job Service*, 412 NW 2d 194 (Iowa 1987).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the

credibility of witnesses, as well as the weight to give other

evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982).

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 considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Employer's evidence that the Claimant was guilty of moving the tags in retaliation for a safety complaint. We do not credit the Claimant's denials. We note that Ms. Arellano's description of what the Claimant said in her conversation with Mr. Cook is not hearsay. What the Claimant said can be considered for any material purpose since a party's own statement, by definition, is not hearsay. I. R. Evid. 5.801. The fact that there was a conversation between Claimant and Cook on that day is proven by Ms. Arellano's firsthand testimony. We thus have a direct conflict of first-hand witnesses Arellano and the Claimant about this conversation. We find that it is Arellano who is telling the truth, not the Claimant. Another factor in our credibility call is that the Claimant leaves us with no idea why Ms. Powell would complain and be so visibly upset. The Claimant claims they had no problems with one another, so why would Ms. Powell think that they did? Also the Claimant argues that others were actually moving the tags but has no idea why. We also have multiple sources of information supporting that the Claimant was moving the tags. *Grover v. Employment Appeal Board*, No. 06-2081 (Iowa App. 6/27/2007). The recorded conversation played into evidence is consistent with what the Employer describing from Seibert at least with respect to Seibert claiming she herself was responsible for only a couple tags being moved. The rest of the conversation, in essence, has the two participants telling each other variously that the tags weren't moved in noticeable numbers, and yet also saying tags were moved but it was just part of having fun on the line. They then segued to complaining about Ms. Powell, which tends to corroborate a motive for the action. The recording, on balance, does little to move our opinion on credibility one way or the other. Finally, we do *not* consider the fact that the Claimant left her meeting with the Employer with anxiety. Normally this would be suspicious, and consistent with a guilty person afraid to face the music. Here, however, the Claimant went to the hospital and all that the leaving proves is that the Claimant was under stress. Innocent people too are stressed by investigative meetings and so we do *not* consider the Claimant's behavior during the Employer's investigation to adversely affect her credibility. We nevertheless do not find her credible.

We note that the Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The majority concur in our determination of finding the Employer's evidence more credible given the factors we identified above.

As far as seriousness the Claimant had been previously warned for violation of the respectful workplace policy, and had been trained. Her moving of the tags was yet another form of harassing a co-worker. This sort of harassment of co-workers is misconduct by itself. Here the Claimant's actions were compounded by the direct effect they had on productivity. Finally, the preponderance of the

evidence establishes that the Claimant was

acting out of a retaliatory motive, i.e., getting back at Ms. Powell for reporting the Claimant's alleged lockout/tag-out violation. Of course it would be illegal for the Employer to retaliate against workers who complain about workplace safety. *E.g.* 29 U.S.C. §660(c); Iowa Code §88.9(3). The Employer thus has added interest in cases such as this to treat retaliation seriously. Thus not only was the respectful workplace policy at stake, and not only was the Employer's productivity adversely affected, but the Employer also needed to protect the integrity of its internal policy for handling workplace safety. Any one of these three concerns would be sufficient to establish the requisite seriousness of the Claimant's actions. We conclude that the Claimant's intentional actions of moving the tags were misconduct even if not retaliatory, but find in addition that they *were* retaliatory and thus all the more misconduct.

DECISION:

The administrative law judge's decision dated December 6, 2017 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".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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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 find that the Claimant was not guilty of an infraction that is serious enough to rise to the level of misconduct.

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Ashley R. Koopmans

RRA/fnv