

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

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MIRNA A ESPINOZA

Claimant,

and

PALMER & COMPANY

Employer.

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**HEARING NUMBER: 11B-UI-16136**

**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 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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Myrna A. Espinoza (a non-English-speaking woman), was employed by Palmer & Co. from June 16, 2009 through October 25, 2010 as a full-time production worker. (Tr. 8, 19-20) The claimant generally worked hours varying between 6:00 a.m. and 4:30 p.m., Monday through Saturday, under Jesse Jurado's immediate supervision. (Tr. 9) The employer issued an employee handbook to the claimant which contained, inter alia, the employer's zero-tolerance policy for harassment in the workplace (Tr. 15-16, 25) for which the claimant signed an acknowledgement of receipt on June 22, 2009. (Tr. 17-18, Exhibit 1)

On October 23, 2010, the claimant approached a co-worker (Ana Ramirez) in the company parking lot after her shift to discuss a personal matter between them. (Tr. 10, 21) Dana Hewlett witnessed the women in the parking lot above her; the claimant appeared to be angry. (Tr. 11, 14) She did not

understand what was being said because Ms. Hewlett did not speak Spanish. (Tr. 14, 24) The following day, Ms. Ramirez reported to the employer that the claimant threatened her saying, “I don’t have to listen to your dumb –ss...the next time, if [you tell me] what to do...or tell Terry (department manager)...[I will] kick your –ss...” (Tr. 13, 32) The department supervisor relayed the complaint to Mr. Jurado. (Tr. 11) An investigation ensued and statements were taken from Ramirez and Hewlett. (Tr. 11, 33) Ms. Espinoza denied threatening and cussing at Ms. Ramirez. (Tr. 23-23) She indicated that she was relaying a message involving a personal matter involving money for which Ms. Ramirez became angry with her. (Tr. 22-23)

When the claimant reported to work on October 25<sup>th</sup>, she was called into the office and terminated for violating the employer’s zero-tolerance policy. (Tr. 9, 27)

The claimant was oftentimes hesitant and had difficulty directly answering questions throughout the hearing due to the language barrier.

#### **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 claimant vehemently denied that she threatened and cussed at Ms. Ramirez on October 23<sup>rd</sup>. And even though the employer argues that Dana Hewlett witnessed the alleged incident, the claimant further refuted the matter indicating that Ms. Hewlett could not have known the contents of her conversation with Ms. Ramirez due to her inability to speak Spanish. The fact that the claimant appeared excited, is not probative that she was harassing her co-worker within the meaning of the employer's zero-tolerance policy. Additionally, the employer failed to present Ms. Hewlett or Ms. Ramirez as witnesses to refute the claimant's testimony; nor did the employer submit their statements to corroborate his testimony. For these reasons, we attribute more weight to the claimant's version of events.

Lastly, we note that the administrative law judge was unnecessarily harsh with the claimant over repetition that could easily be attributed to language barrier, rather than lying. In light of the claimant's steadfast denial that she threatened a co-worker in the parking lot, coupled with the lack of firsthand witnesses to refute her firsthand testimony, we conclude that the employer failed to satisfy their burden of proof.

**DECISION:**

The administrative law judge's decision dated January 13, 2011 is **REVERSED**. The Employment Appeal Board concludes that 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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Monique F. Kuester

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Elizabeth L. Seiser