

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

MICHELLE M CAREY

Claimant,

and

CASEY'S MARKETING COMPANY

Employer.

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HEARING NUMBER: 09B-UI-13114

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. 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, Michelle M. Carey, was employed by Casey's Marketing, Co. from June 28, 2004 through July 27, 2009 as a full-time store manager. (Tr. 4-5, 7, 8-9) The employer got new computers some time in May. (Tr. 11) At this point, the claimant experienced "periods of time when [she] could not complete [her] daily tasks... due to computer issues..." (Tr. 10-11) Casey's was always understaffed, which caused Ms. Carey to have to perform duties outside of her regular managerial duties. (Tr. 11)

In May of 2009, the employer noted the office was 'in a mess', i.e., the claimant had not placed "...newspaper counts in the computer since May 8th, production planners not put in since May 5th,

invoices not filed, two day sheets not put together, deposit tickets not stapled on four-day sheets.” (Tr. 7) The employer issued a verbal warning on May 13th to her regarding her job performance as a store manager (Tr. 7, 8) for which Ms. Carey signed in acknowledgement. (Tr. 12)

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During the middle of July, the claimant had trouble maintaining her daily duties. She conducted several interviews, which resulted in interview worksheets that required being put into the computer. She also had to complete reference checks in anticipation of offering jobs that week. Unexpectedly, her mother had a heart attack for which Ms. Carey was off work for two days (July 20th and 21st, 2009) to care for her sick mother. (Tr. 5, 9, 11) While off, the employer learned that the claimant had not input “... production planners... in the computer [since July 15th]... paperwork [had] not [been] filed... her employees [were] not putting away the truck properly and checking off the invoice properly... (Tr. 5-7)

These employees were generally night shift employees who tried to unload the truck the best they could at the time. (Tr. 9)

On July 27, 2009, Karen Fillinger, terminated Ms. Carey for failing to run the store to her expectations. (Tr. 9)

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 record establishes that the employer had no problems with Ms. Carey's job performance when she was initially hired. (Tr. 7) However, the claimant admits that once the new computer system was installed some time in May of 2009, ongoing computer issues primarily contributed to her timely completion of paperwork. (Tr. 10-11) It appears that for the most part, these delays were not the claimant's fault; rather, a byproduct of possible glitches in the system. Additionally, it was not unusual for the claimant to run a day behind on her production planners when she was coming off a weekend. (Tr. 10) There is nothing in the record to show that Ms. Carey's occasional inability to 'keep up' was intentional. Given the interview processes with which she had to manage in the days prior to her mother's unforeseen illness, it is no wonder she fell behind.

Ms. Carey provided unrefuted testimony that her duties expanded beyond that of store manager as she had to routinely cover for employees on break or absent and was generally pressed for time due to understaffing. (Tr. 11) The fact that she was behind during that fateful week was due to mitigating circumstances that negatively impacted her job performance. The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. As for the two employees who failed to properly unload the trucks, Ms. Carey provided a plausible explanation that these employees customarily worked nights and were unfamiliar with daytime procedures. Based on this record, we conclude that the employer failed to satisfy their burden of proving disqualifying misconduct.

DECISION:

The administrative law judge's decision dated October 8, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

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.

Monique F. Kuester

AMG/ss

A portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

John A. Peno

Elizabeth L. Seiser

Monique F. Kuester

AMG/ss