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

PHOUVANH LOVAN Claimant, and RETIREMENT SOLUTIONS GROUP INC Employer.	:	HEARING NUMBER: 09B-UI-07262 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 Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board 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, except as they are inconsistent with the comment below, are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Employment Appeal Board emphasizes that it has taken great pains in reviewing the record to separate those facts that were known to the Employer at the time of discharge from details that arose after the fact. We are fully aware that the Claimant cannot be disqualified based on a reason that was not an actual reason for the discharge. *West v. Employment Appeal Board*, 489 N.W.2d 731, 734 (Iowa 1992); *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991); *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 669 (Iowa 2000).

Yet, we do not want to overstate the case on the use of evidence discovered after the termination. The Claimant seems to argue that evidence of wrongdoing may never be considered unless that *evidence* was known to the Employer at the time of the discharge. This is incorrect. What counts is that the

wrongdoing was known and acted upon. *Wrongdoing* that was unknown at the time of discharge cannot

be used to disqualify. But where wrongdoing actually motivated the discharge then later-developed *evidence* of that wrongdoing *can* be considered. We clarify with an example. Suppose a claimant is fired for theft based solely on a co-worker's report. At hearing the Claimant confesses. Are we supposed to disregard the confession because it occurs after the decision to discharge? Of course not. The issue of misconduct is twofold: (1) What did the Claimant do (if anything) that got her discharged? and (2) Does that reason constitute misconduct? A mere *post hoc* justification of a discharge will never serve to disqualify. But an actual reason for discharge may. And evidence of that reason may include *evidence* that was unknown to the Employer at the time of the discharge. So long as the Employer is limited to proving that the actual reason for the discharge was misconduct, the proof of that actual reason need not be limited to evidence that was extant at the time of the discharge.

The Administrative Law Judge was careful at hearing to make clear that he was focusing only on the actual reason for the discharge. We do so today. Thus, for example, it is clear that the Employer knew, prior to the discharge, that the Claimant's dereliction of her job duties had cost the Employer money. Presently, the Employer argues about how *much* money the Claimant had cost it. This detail appears to have been worked out only after the fact. Similarly, the Employer was aware generally that the Claimant wasn't getting work done because she was spending so much time on personal matters. Yet the Employer did not know the extent of the personal use of e-mail, certainly not to the level of detail represented by the exhibits. Thus we do not disqualify because the Claimant cost a *specific* amount of money, or because it has been proved exactly how excessive her e-mail habit was. Focusing on the actual reasons for the discharge, as proved by the Employer, the Claimant was terminated for her shirking her duties to such a degree as to constitute willful disregard of the employer's interests. We thus base our decision on the Claimant's actions of willfully not getting her work done, and disregarding her instructions, and not on "excessive use of e-mail."

Finally, we do take the Claimant's point on the discovery issues. We have considered the exhibits attached to the Claimant's argument, not as new and additional evidence, but as supplements to the Claimant's motion to exclude the extensive e-mail exhibits. We do note that four of these exhibits were known to the Claimant at the first hearing, and thus she can hardly claim surprise at the second hearing. Of these four the only particularly relevant one is Exhibit One, which is the resignation that no one disputes. We therefore have considered Exhibit One in today's decision. Because of their marginal relevance, and because of the failure to supplement discovery, we have completely disregarded exhibits 3 through 11 when making today's decision.

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John A. Peno

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Elizabeth L. Seiser

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RRA/fnv

Monique F. Kuester