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

AMANDA R PEPPERS	:	
	:	**HEARING NUMBER:** 17BUI-00288
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
AUTOZONERS 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, 96.3-7

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. 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, Amanda Peppers, worked for Autozoners, LLC, from June 10, 2011 through December 9, 2016 as a full-time commercial sales manager. (12:00-13:45; 29:48-30:14; 33:37-33:43) The Employer made the Store Handbook available at the start of her employment for which she acknowledged receiving, and was required to read annually. (7:09-7:17; 21:55- 22:16; 41:38-41:43; 41:56-42:16; 49:00-49:34; Exhibit 1-faxed p. 04/11) The Employer has a policy that expressly prohibits racist remarks or jokes in the workplace. (Exhibit 1-faxed p. 03/11)

During her employment, Ms. Peppers used racist and offensive remarks in describing customers and co-workers. (15:30-15:40; 17:35-17:51; 18:05-18:13, Exhibit 1-faxed p. 02/11) She oftentimes used the n-word in reference to customers while speaking to other employees

or when muttering to herself (44:43-44:45) if she felt the customers were being rude or ignorant. (39:05-39:53) She and an assistant manager

made comments to an employee of Puerto Rican descent that he was going to be sent back to Puerto Rico on a 747 airplane when he made mistakes. (32:20-32:40; 34:54-35:34; 36:26-36:52) This employee made similar comments in return so the Claimant assumed such comments did not offend him. (31:30-33:30) After the assistant manager left employment, Ms. Peppers continued to make these comments towards the employee.

The Claimant's immediate supervisor, Jimmy Edelmon, warned her prior to his going on medical leave for nearly two months beginning in September of 2016 (26:46-27:44; 46:14-46:20; 48:00-48:08) that her use of the n-word could get her terminated. At or around November 15, 2016, the Employer received complaints about the Claimant's offensive remarks about customers and employees in the workplace. (15:33-15:41; 16:45-16:58; 46:42-46:46) An investigation ensued.

The investigation concluded on November 30, 2016 after Regional HR Manager Louise Rinke interviewed several employees about complaints raised against Ms. Peppers and her comments. (14:48-14:50; 17:10-17:12; 18:35-18:47; 21:25-21:34; 46:47-47:09) The Claimant, who was also interviewed initially admitted using variations of the n-word in describing customers (19:00-19:45; 21:35-21:48; 38:05-38:31; Exhibit 1-faxed p.02/11 & p. 09/11), but denied ever referring to other employees as wetbacks, Mexicans or Puerto Ricans. (19:46-20:05; 31:20-31:25; Exhibit- faxed p. 08/11)

After reviewing all the information garnered from the interviews and discussing the matter with upper management, the Employer concluded that Ms. Peppers violated three company policies, which led to her termination on December 9, 2016. (14:27; 15:09-15:15; 20:10-20:52; Exhibit 1-unnumber p. 2) The Employer had issued previous verbal warnings to Ms. Peppers about other violations, i.e., abusive language in the workplace, but these did not factor into her termination. (22:50-24:09)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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 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. We attribute more weight to the Employer's version of events. Ms. Peppers admitted that she electronically acknowledged that she read the Employer's handbook (41:56-42:16) and therefore, she is attributed with knowledge of its policies and procedures, which is also inherent in her responsibilities as a manager. She knew, or at the very least should have known, that her use of racial terms and joking references to ethnicity were off limits in the workplace and a policy violation. In her managerial position, Ms. Peppers is held to a higher standard of behavior in fulfilling her duties and the Employer has a right to expect that she would use the utmost professionalism in complying with its policies. To allow and tolerate her type of behavior in the workplace would not only undermine morale, but create a hostile work environment for others, both employees and customers. Her behavior could negatively impact the Employer's business interests.

The Claimant's overall feigned ignorance of company policy is simply not credible even if she didn't read, word for word, the company handbook. Any reasonable person would know that use of such language is inappropriate. And let's consider for the sake of argument she truly didn't know that her use of the n-word was racially offensive, she was put on notice that it was offensive and that her job could be in jeopardy back in September before her supervisor went on medical leave. For her to continue using it in mid-November establishes that she intentionally disregarded the Employer's policies. The Claimant's argumentative excuse that she never used the n-word on the sales floor and only did so in the back room is probative that she knew it was wrong, and does not absolve her of culpability (44:17-44:24); nor do we find her denial that she knew the n-word was racially derogatory credible. (43:47-44:10)

In addition, Ms. Peppers' equivocal response to being asked if she referred to Josh's being Puerto Rican and being deported to Puerto Rico when he made mistakes also undermined her credibility. It doesn't matter that Josh was offended or not, her comments were, again, against company policy. The fact that another manager did it does not detract from the noncompliance with policy aspect of her behavior. In *Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987) the Court refused to excuse the "mooning" of a co-worker even though the whole thing was a supervisor's idea. The Court found no apparent authority, even given the planning and participation on the part of the claimant's own superior, to engage in misconduct. "The mere fact a foreman instigates and approves of egregious conduct does not mean it is reasonable to believe the employer has consented to this approval." *Crane* at 197.

Based on this record, we conclude that the Employer satisfied their burden of proving that the Claimant knowingly violated company policies. The delay in timing between the conclusion of the investigation on November 30th and the actual termination was not unreasonable in light of the information the Employer had to consider and the Claimant's several years as a manager.

DECISION:

The administrative law judge's decision dated February 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 she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Lastly, because the Claimant has received two consecutive agency decisions that allowed benefits, the Claimant is now subject to the double affirmance rule.

Iowa Code section 96.6(2) (2007) provides, in pertinent part:

> …If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision in finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5…

871 IAC 23.43(3) provides:

> Rule of two affirmances.
>
> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.

(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.

(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

In other words, as to the Claimant, even though this decision disqualifies the Claimant for receiving benefits, those benefits already received shall ***not*** result in an overpayment.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv