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

RAJEN SHARMA	:	
	:	**HEARING NUMBER:** 10B-UI-09006
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
GENERAL NUTRITION CORPORATION	:	

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

D E C I S I O N

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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Rajen Sharma (Claimant) worked for General Nutrition Corp. (Employer) as a full-time store manager from June 29, 2009 until he was fired on May 18, 2010. (Tran at p. 2-3). As the store manager, the Claimant was responsible for making sure the store was properly secured. (Tran at p. 4-5). Tom Anderson is the Regional Loss Prevention Manager (Tran at p. 2).

On May 5, 2010, Mr. Anderson went to the Claimant's store to do an audit. (Tran at p. 3). Mr. Anderson met employee Patrick Sharp at 9:30 a.m. (Tran at p. 3). Mr. Sharp could not open the store, because he did not have a key. (Tran at p. 3). Mr. Sharp was the only employee who had not been assigned a specific key. (Tran at p. 5; p. 6; p. 18-19). Mr. Anderson understood from Mr. Sharp that the Claimant had told him to put a store key in a mall kiosk. (Tran at p. 3; p. 26). The kiosk was not owned

by the Employer and was not secured. (Tran at p. 3-4). Since the kiosk was not secured, keeping a store key in the kiosk would have violated the employer's security policy. (Tran at p. 3-4). The key was, nevertheless, not in the kiosk. (Tran at p. 3). Even though it was the Claimant's day off, Mr. Sharp called the Claimant. (Tran at p. 3). The Claimant then came down to open the store. (Tran at p. 3).

Based on Mr. Sharp's statements, the Employer concluded the Claimant directed Mr. Sharp to leave a store key in a mall kiosk so he had a key to open the store in the morning. (Tran at p. 3-4). The Employer discharged the Claimant based on its belief that he had violated the Employer's security policy. (Tran at p. 3-4; p. 9; Ex. 1).

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.

"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).

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 have found credible the Claimant's denial that he ever told employees to leave a key at the mall kiosk. (Tran at p. 7).

We are mindful that the Administrative Law Judge in this case weighed the evidence differently than we do. We are equally mindful that the ultimate decision on whom to believe is ours to make. *Kruse v. EAB*, 2001 WL 26192 (Iowa App. 1/10/01); *Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308, 311 (Iowa 1991). We grant deference to the Administrative Law Judge's decisions regarding credibility, although this deference is lessened where, as here, the hearing took place by telephone. Even doing so, we find the Claimant more credible.

While the Administrative Law Judge found inconsistencies in the Claimant's story, we are not convinced there is any substantial variation. On August 10 the Claimant testified he generally met with Mr. Sharp the day before opening or closing, and gave his key to Mr. Sharp. (Tran at p. 7). The key issue had been going on for four to six weeks. (Tran at p. 6). The September testimony refers to what happened after one of the employees went on a vacation for a couple weeks. (Tran at p. 19). This employee's key was given to Mr. Sharp. (Tran at p. 19). The supposed inconsistency is explained by nothing more complicated than the practice changing temporarily during somebody's vacation. And it explains how Mr. Sharp could leave a key in the store (as described in his statement), and yet the Claimant had his own key. (Tran at p. 19; p. 20; p. 21-22). The key left in the store would have been that of the employee on vacation. Moreover, the fact that Mr. Sharp forgot the key has a slight tendency to corroborate that he was not used to keeping track of a key, and that this was only a temporary practice. We also note an obvious inconsistency occurs in Mr. Sharp's claim of the kiosk practice. If the key was to be left in the kiosk, then why wasn't it there? As between the Claimant and Mr. Sharp we find the Claimant credible in large part because he supplied in-person testimony. We do not automatically find that hearsay will be outweighed by live testimony. *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005); *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Yet the fact that the Employer chose to rely entirely on hearsay is a significant factor we must take into consideration when determining if the burden of proof has been carried.

The Claimant's testimony is bolstered by hearsay proffered by him at the hearing. (We *have not* considered the actual statements which are contained in the administrative file, since they were not offered at hearing and are not part of the evidence in the record). He has his own statement from Mr. Sharp, which is somewhat at odds with the hearsay from Mr. Sharp described by the Employer. Meanwhile, the kiosk owner has no reason to lie that is apparent to us. His statement is that no key was ever kept at the kiosk. Moreover, the statement of the kiosk manager is that there "was some discussion" about leaving the key. This provides a ready explanation for Mr. Sharp's confusion: somebody discussed the practice, which was never followed or approved, and Mr. Sharp remembered only the discussion. Also, frankly, there is an obvious reason for Mr. Sharp to lie to Mr. Anderson on May 5. According to the Claimant, and Mr. Sharp's later statement, Mr. Sharp had forgotten his key.

Could it be that a short-term

employee, not understanding the problems he would create, lied to the Regional Loss Prevention Manager to cover up that he had lost track of the key? Is it possible that he, remembering the kiosk discussion, looked for the key there in the vain hope he wouldn't have to tell about his screw up? Of course it is. We do not say that this is what actually occurred, only that the contradiction of the Claimant is not sufficiently convincing as to overcome his denials. Considering these various factors, we find the Claimant's first-hand testimony to be more convincing than the Employer's statement from Mr. Sharp.

Finally we note that the Employer has the burden of proof. Even if we were to find the witnesses equally credible the evidence would be in equipoise. When this is the case the party with the burden, here the Employer, loses. Thus even if we were to find the evidence equally credible we would reach the same legal conclusion: the Employer has failed to prove misconduct by a greater weight of the evidence.

DECISION:

The administrative law judge's decision dated October 5, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

_____
Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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.

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Monique F. Kuester

RRA/fnv