

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

NANCY E CAPUTO

Claimant,

and

KASTIM CORPORATION

Employer.

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HEARING NUMBER: 10B-UI-01590

**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: 96.5-2A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. Two 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, Nancy E. Caputo, was employed by McDonald's of Fort Dodge, #17678, from Mach 30, 2009 through December 21, 2009 as a part-time crew member. (Tr. 2, 6) The employer has a strict policy that prohibits the use of "...threatening or abusive behavior or profanity ...in front of customers..." (Tr. 4-5)

On December 19th, Ms. Caputo was in the restroom. While in the midst of her 'personal affair,' she realized she had no toilet tissue. She asked the customer who was in the restroom with her little girl at the time to please hand her some toilet paper under the door. (Tr. 2-3, 4, 6-7, 14) At first, there was no response and the claimant repeated her request. The customer retorted, "I can't get to it right now..." and then left the restroom. (Tr. 14) When the claimant came out of the restroom and returned behind the counter, she loudly complained about "...how rude people were." (Tr. 8-9, 10)

A couple of days later, the employer called her into the office stating that "...this is about Saturday..." (Tr. 7-8, 9, 10, 12) Ms. Caputo immediately thought she was being disciplined for being angry and talking loud about a customer behind the counter. The employer got a call from the corporate office who received a complaint from a customer who claimed Ms. Caputo used the 'f' word and stated that Ms. Caputo told the customer that she hoped the customer would "rot in hell" when she didn't give her toilet paper. (Tr. 3-4, 9, 13) The claimant denied using profanity to this customer or having any prior warnings for past such behavior or any other infractions. (Tr. 9, 14-15) The claimant requested that the employer only he give her a suspension, which the employer denied. Instead, the employer terminated her for violating company policy.

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 claimant was terminated for what appears to be an isolated act. The claimant was accused of using profanity toward a customer who was in the bathroom with her 2-year old daughter. The employer failed to bring forth any firsthand witnesses to the incident for which the claimant vehemently denied using profanity. The claimant does admit that she was upset by the customer's very rude behavior toward her which did arouse her anger. However, Ms. Caputo testified that several co-workers who worked with her that evening agreed that she was loud, but did not use any profanity. (Tr. 7)

Ms. Caputo argues that she had never talked to anyone in that matter, much less a customer with child. (Tr. 15) She provided unrefuted testimony that her employment record was void of any prior infractions. (Tr. 9, 15) The claimant also denied that she admitted the accusations at hand to the employer, contrary to the employer's testimony, which was equivocal at best. (Tr. 12-13, 16-17) In reviewing this record as a whole, we conclude that it establishes only that the claimant's behavior, at worst, was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. For this reason, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated March 23, 2010 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.

John A. Peno

Elizabeth L. Seiser

AMG/fnv