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

KIMBERLY BIRNBAUMER	:	
	:	**HEARING NUMBER:** 10B-UI-00683
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
CASEY'S MARKETING COMPANY	:	
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 DENIED

The employer 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, Kimberly Birnbaumer, was employed by Casey's Marketing Co. from April of 2003 through December 15, 2009, initially, as a full-time manager (Tr. 2, 12), but stepped down in 2007 to become a day cashier and second assistant manager at another store. (Tr. 3, 7) She then became a donut-maker in August or September of 2009. (Tr. 3)

As a manager, Ms. Birnbaumer had access to the store computer that kept confidential employee records, i.e., "…social security numbers, driver's license numbers, date of birth." (Tr. 3-4,) "…Casey's has a Code of Conduct and Business Ethics policy…3.7, the employee confidentiality…" which governs a store manager's protocol for accessing such information. (Tr. 5) When the claimant was no longer a manager, she made an unauthorized access of the store computer for which she was disciplined. (Tr. 7)

The claimant's boyfriend, Dan Steil (Tr. 9, 13) worked for the employer at the Oralabor & Delaware location in Ankeny (Tr. 3, 12) where Randy Denham was the store manager. (Tr. 8-9) Dan was unhappy because he hadn't yet received a raise and constantly complained to the claimant. (Tr. 14) On December 11th, 2009, the claimant came into the Ankeny store. (Tr. 5, 9, 13) Dan was still upset because he hadn't gotten a raise with his November 16th, 2009 performance review. (Tr. 14) Ms. Birnbaumer waited until her boyfriend's store manager was gone from the store to access the computer in the manager's office. (Tr. 4, 14) She accessed her boyfriend's personnel information and told him what his hire date was. (Tr. 14)

Ms. Birnbaumer's action came to light the following day when Randy Denham received a report that someone had been in his office using the computer. (Tr. 9) The only other person who should have access to Mr. Denham's computer was his assistant store manager 'with authorization.' (Tr. 10) Denham observed the claimant on video and confirmed activity on his office computer. (Tr. 5, 9, 10-11, 18) The employer terminated Ms. Birnbaumer for violating the company policy regarding confidentiality and computer access. (Tr. 5)

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 only managers and their assistant managers can have computer access to employees' confidential employment information not and only at that particular manager or assistant manager's store location, but essentially, 'on a need-to-know basis. (Tr. 5) And with that, the assistant manager must have prior authorization from his or her store manager. (Tr. 10) In the instant case, Ms. Birnbaumer no longer had such authorization when she stepped down from her managerial position to ultimately becoming a donut-maker. (Tr. 3, 7)

Although she argues that she was unaware that her actions were wrong (Tr. 15), and that she didn't quite understand the code of conduct (Tr. 16), we find her testimony not credible in light of her past disciplinary warning in the fall of 2009. (Tr. 7, 15) Ms. Birnbaumer's computer access was a violation of the employer's code of conduct (Tr. 5) on two counts: 1) as a donut-maker, she had no authority to access employee information; and 2) even if she were a manager, it was totally inappropriate to access another manager's computer from a different store location for information regarding the an employee who did not work under her authority. The fact that the claimant waited until the manager left the store to gain access to her boyfriend's personnel record is probative that her action was intentional and willful. Her boyfriend did not work at her store location, nor was he a subordinate to which she had a 'need-to-know' his employment status. The claimant's use of her prior managerial knowledge to gain access to personal information constituted a "…a material breach of the duties and obligations…. evincing such willful or wanton disregard of an employer's… standards of behavior which the employer has the right to expect of employees…" 871 IAC 24.32(1)"a", supra. For this reason, we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated March 2, 2010 is **REVERSED**. 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".

_____
Monique F. Kuester

_____
Elizabeth L. Seiser

AMG/ss

DISSENTING OPINION OF JOHN A. PENO:

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.

_____
John A. Peno

AMG/ss