



Iowa Civil Rights Commission complaining about rudeness from the Claimant, and about the Claimant allegedly slapping his hand. (Tran at p. 8; Ex. F).

Jimmie Cameron is an African American man 55 years of age. (Tran at p. 24). Mr. Cameron had been employed for about a month on August 7 when the Claimant, Mr. Cameron, Audrey Bishop, Deb Docum and other co-workers were sitting at a large work table. (Tran at p. 2-3; p. 5; p. 19; p. 23-24; p. 28 [month]; p. 32). Ms. Docum asked the claimant what her favorite books were when she was a child. Claimant mentioned *Little Black Sambo* and *Pokey Little Puppy*. (Tran at p. 16; p. 24; p. 29 [talking to Deb]; p. 32-33; p. 38-39; p. 42). Mr. Cameron kept working and did not look up. (Tran at p. 24-25). On August 7, 2009 assembler Ms. Bishop reported to Severino that the Claimant had "picked on" Mr. Cameron. (Tran at p. 2-3; p. 18-19; p. 21). In addition, during his interview, Mr. Cameron alleged that the Claimant had been rude to Mr. Jansen, who has autism, by telling him he had better not be giving her any "lip." (Tran at p. 5; p. 28).

In response to Bishop's report, human resources specialist Molly Edgeburg, Severino, and Schmeling conducted an investigation that concluded Claimant was overheard saying "black Sambo" within ear shot of Mr. Cameron. (Tran at p. 2-3; p. 5). On August 10 the Employer had a meeting with the Claimant about a civil rights complaint accusing her of slapping Fransisco Gonzalez Varela's hands. (Tran at p. 8; Ex. F). In that investigation she denied slapping him but admitted raising her voice and becoming angry. (Tran at p. 31-32). The claimant was not disciplined. At the time of the hearing the Civil Rights Commission had not issued a decision in the matter.

The Employer has not proven that the Claimant in fact was rude to Mr. Jensen, or that she slapped Mr. Varela. (Tran at p. 31-34). The Employer has not proven that the Claimant chose to mention *Little Black Sambo* because she was trying to pick on, tease, or upset any of her co-workers. (Tran at p. 32-33; p. 38-39).

Because of the civil rights complaint and the more recent information about Mr. Cameron and Mr. Jansen, supervisors Chom Tong Vanh, Severino, and Schmeling decided to fire the Claimant. ((Tran at p. 8-9; Ex. A). Had the Employer not believed the Claimant purposely referred to *Little Black Sambo* as a means of racial harassment, the Claimant would not have been fired. (Tran at p. 2-3; p. 14; p. 22; p. 23).

#### **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).

We certainly understand the objections to the *Little Black Sambo* storybook. The plot of the story is, at base, a story about a boy from India using brains to overcome brawn. But as told, the images and verbiage employed are deemed offensive to many. The term "Sambo" in referring to someone of African descent is now "taboo and derogatory." (Dalzell & Victor, *Concise New Dictionary of Slang*, p. 556, 2008). But the issue in this case is not whether the book is offensive. The issue is whether the Employer has proven that the Claimant intentionally mentioned the book as a means of getting at Mr. Cameron. As our findings make clear, we do not think that the Employer has carried this burden.

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. Essentially we have found the Claimant's explanation of her mention of *Little Black Sambo* to be credible. The book was, during the period under discussion at the table, sometimes read as a children's book and it is credible that the Claimant would have been exposed to the book. The volume of the Claimant's response has not been shown to be anything out of the ordinary, especially given the Claimant's hearing problems. (Tran at p. 43). We recognize that the Claimant had a history of complaints, and that the Employer took this into account when it terminated her. However, we note that the employer never issued any written warnings or discipline to the claimant in these matters. Additionally, the claimant had a history of favorable evaluations including one shortly before her discharge. But the evidence shows that but for the Employer's belief that the Claimant was intentionally trying to upset Mr. Cameron the Claimant would not have been fired. As we have found, the Employer has not proven that the Claimant had a willful or wanton ulterior motive in her discussion of the book. We note that although the incidents in the civil rights complaints played a role in the decision to terminate, the employer did not discipline the claimant. Thus, those incidents have neither been shown to rise to the level of misconduct nor are they

current acts in terms of the Employment Security Law. (Tran at p. 31-32). There is no evidence to suggest a decision was issued by the Civil Rights Commission at the time of the hearing. Also the evidence falls far short of

showing that the Claimant was rude to Mr. Jansen. The Employer has failed to show that the *Little Black Sambo* incident was an act of misconduct and thus the Claimant is not disqualified. *Bridgestone/Firestone, Inc. v. EAB*, 570 N.W.2d 85, 91 (Iowa 1997)(discussing causality in unemployment cases).

**DECISION:**

The administrative law judge's decision dated December 7, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason / quit for good cause attributable to the employer. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss

**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/ss