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

HEATHER M JOHNSON

Claimant,

and

FAMILY AND PROFESSIONAL LEARNING CENTER

Employer.

HEARING NUMBER: 09B-UI-13991

EMPLOYMENT APPEAL BOARD DECISION

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

FINDINGS OF FACT:

The administrative law judge's Findings of Fact are adopted by the Board as its own with the following modifications and additions: Mr. Harmelink concluded his investigatory interviews on August 8, 2009 when he met with Amy Maurer regarding Ms. Johnson's conduct.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge's Conclusions of Law are adopted by the Board as its own with the following modifications and additions:

The final paragraph of the Reasoning and Conclusions of Law is deleted and the following is inserted in lieu of it:

The law limits disqualification to current acts of misconduct:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); accord Ray v. Iowa Dept. of Job Service, 398 N.W2d 191, 194 (Iowa App. 1986); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 509, 510 (Iowa App. 1985). Even when we find that allegations made by an employer would establish misconduct, there remains, however, whether the alleged acts were current in terms of the discharge. In determining whether a discharge is for a current act we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination and comparing this to the date the misconduct first came to the attention of the Employer. Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given). Here the Employer first learned of the possible misconduct on August 1. The Employer, however, continued to investigate until August 8. This was a reasonable period of investigation. The delay in question is therefore from August 8 until the discharge on the 20th, a matter of twelve days. Given the Claimant's own outrageous misconduct the termination was well justified. But the operational problems posed by terminating *two* key employees in August meant that the Employer would have faced considerable hardship if the terminations were immediate. Under the particular circumstances of this case the delay while seeking a replacement was understandable, else the Employer would suffer unduly from the fact that the Claimant was a key employee, as was her accomplice. The Claimant should not be able to benefit from the fact that she was in a key position of trust and abused the trust. We deny benefits.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) 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.
>
> 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.

Thus the Employer's account **may not be charged** for any benefits paid so far to the Claimant for the weeks in question, **but** the **Claimant will not be required to repay** benefits already received.

DECISION:

The administrative law judge's decision dated October 16, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made since under the double affirmance rule, 871 IAC 23.43(3), no overpayment can be assessed, but still the Employer's account may not be charged.

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/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.

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John A. Peno

RRA/ss