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

LAWRENCE KHOUNXAY Claimant, and SEARS ROEBUCK & COMPANY Employer.	:	HEARING NUMBER: 08B-UI-01420 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 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:

Lawrence Khounxay (Claimant) was employed by Sears (Employer) from August 29, 2001 until January 9, 2008. (Tran at p. 2). He was last employed full time as a customer service representative handling inbound calls. (Tran at p. 2). When a representative receives an incoming call, there is a beep through the headset. (Tran at p. 2). At that point, a greeting is to be given to the caller. (Tran at p. 2). The Claimant was discharged for the stated reason of manipulating the telephone system in order to avoid work. (Tran at p. 2; Ex. 3; Ex. 9).

The decision to discharge the Claimant was based on a call that came in on December 31, 2007. (Tran at p. 2). On the December 31 call the Claimant did not give any greeting when he was notified that he had an incoming call. (Tran at p. 2; p. 3). Instead there was 17 seconds of silence. (Tran at p. 3; p. 7; Ex. 6). The call was then transferred to the voice response unit. (Tran at p. 2; p. 3; p. 7). Team Manager Louis McCaslin was monitoring the call. (Tran at p. 8; Ex. 3; Ex. 7; see p. 2 [Identifying person monitoring as Team Manager]). Upon listening to the call, he went immediately to speak with the Claimant but the Claimant had signed out for lunch. (Tran at p. 9). Mr. McCasling did not again attempt to speak with the Claimant about the incident. (Tran at p. 3). No one spoke with the Claimant about this call until he was notified of his discharge on January 9, 2008. (Tran at p. 3). The delay in the discharge was not caused by an investigation of the incident. (Tran at p. 3).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 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, or at least of notice to the employee of possible disciplinary action, 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). In the past a different majority of this Board has held that if an Employer acts as soon as it reasonably could have found out about the infraction under the circumstances then the action is for a current act. The majority members in this case are not in total agreement on the standard for determining if an act is "current". We do agree, however, that even under the standard that is more favorable to employers the Employer has failed to establish a current act in the context of this particular case.

The most an Employer can ask, barring exceptional circumstances, is that it be allowed a delay in terminating so that it may conduct an investigation, draw a conclusion, and make necessary assessment of the seriousness of the infraction. In the circumstances of this case a Team Manager listened in on the call in question, the Team Manager promptly reported the call to his superiors, and the nature of the alleged infraction is not complex. All that was required was a possible explanation from the Claimant. A meeting or a phone call to the Claimant asking, "Hey, why did you miss that call on the 31st" would be just about all it took. If the Claimant stated he was dealing with some work-related problem with another worker then maybe then a conversation with that worker would be needed. But this should not take nine days even if it was New Years. Indeed, a delay in investigating a matter that is such a small part of the workday seriously hampers the investigation itself. It would be not at all surprising if the Claimant were unable, several days later, to recall just what caused the delay. Thus fairness and the Employer's own interest in accuracy, as well as the Employment Security law, would have been served by a prompt investigation in this case. In any event, as far as we can tell, the Employer made no investigation at all. An employer is not *required* to investigate before it terminates but an Employer

may not justify a *delay* in termination by an investigation that did not take place. With no adequate explanation for the delay we are unable to conclude that the discharge was for a current act of misconduct under 871 IAC 24.32(8).

Finally, although we are not confident that the Employer has proved misconduct, we do not address whether the final act was sufficiently serious as to be misconduct. The fact of a 17-second delay does, in the context of a seven-year career, seem minor. Also the fact that the Employer took so long making up its mind on whether to discharge seems to corroborate this view. Although we express some doubt on whether the Employer has, even given the prior discipline, proved that the final act rose to the level of misconduct, we do not make a ruling on this issue today. Instead, we allow benefits because we have found that the Employer's action was sufficiently delayed as to make the discharge not for a current act regardless of whether that act was misconduct.

DECISION:

The administrative law judge's decision dated February 26, 2008 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. The overpayment entered against claimant in the amount of $1,656.00 is vacated and set aside.

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Elizabeth L. Seiser

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John A. Peno

RRA/fnv

DISSENTING OPINION OF MARY ANN SPICER:

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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Mary Ann Spicer

RRA/fnv

The claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED.**

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Elizabeth L. Seiser

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Mary Ann Spicer

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John A. Peno

RRA/fnv