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

ROBERT A BUCKLES	:	
	:	**HEARING NUMBER:** 17BUI-06242
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
HY-VEE INC	:	
	:	
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

STATEMENT OF THE CASE:

The issue of timeliness was raised when the Employer filed an appeal that was faxed on August 11, 2017, nearly two weeks beyond the statutory deadline of July 27, 2017. The reason for the delay was because the Employer never received the Notice of Decision until after it contacted the agency. For this reason, we find good cause has been established for the late appeal, and the board shall consider it to be timely.

The Employer 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, Robert A. Buckles, was employed by Hy-Vee from July 10, 2015, initially part-time in the meat department, then as a full-time baker until May 16, 2017. (1:02:03-1:02:18; 1:9:05-1:09:11) At the time of hire, the Employer provided Mr. Buckles with an employee handbook containing a policy that prohibits

harassment, including sexual harassment. Part of that policy specifically prohibits "…unwarranted injection of sexual matters in the work place…" The Employer provided Mr. Buckles with an updated handbook in 2016 containing the same sexual harassment policy for which the Claimant signed in acknowledgement of receipt on July 10, 2015. (1:02:50-1:04:39; 1:04:50-1:05:35; Exhibit 17 & 19)

The Claimant experienced performance issues for which the Employer issued several reprimands for deficiencies in his bakery duties. His most recent reprimand occurred on March 21, 2017 for a March 17th production issue. (35:45-35:52)

On April 18, 2017, the Claimant asked a 17-year old female who worked the school-to-work-program in the bakery for a kiss before he left work that day. (28:00-28:10; 52:28-52:36) Upset, the young lady immediately reported the incident to Mr. Goudy, the Bakery Manager. He, in turn, had the young lady repeat the matter to Ms. Wahl, Human Resources Manager. (52:11-52:25) Ms. Wahl observed that the young lady was visibly shaken and allowed her to go home. (52:37-52:44) The next day, the young lady's mother phoned the store to complain about the incident, and inform the Employer that the young lady would not be returning to Hy-Vee. (52:47-52:50)

On April 20, 2017, Ms. Wahl and Mr. Goudy questioned the Claimant about incident to which Mr. Buckles admitted he was joking around, but did not mean anything by it; he also specifically indicated that he didn't remember asking the young lady for a kiss. (53:17-54:46) The Employer interviewed another employee, who no longer works for the Employer, who admitted that the Claimant frequently said inappropriate things, as did she in playful banter, but she didn't think it was serious. This prompted the Employer to review the policy with the bakery employees. (57:40-59:02) The Employer issued a disciplinary warning on April 20, 2017 advising Mr. Buckles "…not to make any comments to employees that are inappropriate. He will keep all conversation work related and work appropriate…If there are any more issued pertaining to conduct, work performance, dress, code, or attendance, Bob will be terminated…" (54:57-56:02; Exhibits 4, 6-7) Mr. Buckles signed in acknowledgement of receipt of this warning. (55:29)

At the end of his shift on May 23, 2017, Mr. Buckles went to the doorway of Laura Franklin (Accounting Coordinator) to ostensibly ask her a question about a payroll deduction from his check, which he never asked. She greeted him, saying 'hello, how you doing?' and asked what his plans were for the weekend. He responded that when he did not have to work, "…he liked to get together go out and have a party and be with friends and family and get nasty with them (1:13:50-1:14:05) entertain…go out with nasty people and have a good time..." (1:14:21-1:14:35) He also indicated that, "…[his] significant other, we're open and honest people, we don't judge people…and move on with our lives." (1:15:12-1:15:28) Ms. Franklin said good-bye and the Claimant left. Ms. Franklin felt she was just propositioned and immediately texted the Claimant's immediate supervisor, Mr. Goudy, to relay the incident. (Exhibit 3) Ms. Franklin and Mr. Goudy had previously been in a romantic relationship. Based on that prior relationship, Mr. Goudy advised Ms. Franklin to direct her concern to Kay Kress, the Store Director, and Staci Wahl, the Human Resources Manager.

On May 14, 2017, Ms. Franklin sent the following email message to Ms. Kress and Ms. Wahl:

> Yesterday I had an issue with Bob Buckles. He had just gotten off work and was standing in my office doorway so I said hello and asked if he any weekend plans with it being Mother's Day weekend. He said no, but he wanted to have a party with friends sometime

> when he didn't have to work. That escalated into him saying that he and his girlfriend are very open with what they do and who they are, and that if he didn't have to work, he'd call up some 'nasty people' and they'd have a party. He just kept repeating the part about he and his girlfriend not being shy about who they are. The situation made me very uncomfortable and feel like I was being propositioned. I've never had a problem with him before, but this was inappropriate for the workplace and I don't want anyone else to have to deal with it. (Exhibit 2)

On May 15, Ms. Kress met with Ms. Franklin, who reiterated the contents of her e-mail. The next day, Ms. Kress and Ms. Wahl met with the Claimant. The Employer questioned the Claimant about the conversation to which he acknowledged it, but stated that he did not have a good recollection of it. (25:13-25:32) When she refreshed his memory by showing him the e-mail, he did not deny it; and instead, he apologized for it. (25:35-25:45) Ms. Kress specifically asked Mr. Buckles whether he had mentioned to Ms. Franklin that he and his girlfriend were open and wanted to call some nasty people to which he replied 'yes' and told her that he wanted to party and that he liked to relax during his down-time. Ms. Kress discharged the Claimant on May16, 2017 for "Conduct unbecoming of a Hy-Vee Employee—inappropriate conversations with female employees."

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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.

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).

871 IAC 24.32(8) provides:

> *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.

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. We attribute more weight to the Employer's version of events. Although the Employer's testimony regarding the last two incidents consists primarily of hearsay, we would note that hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency. Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995) In addition, whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14 (1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982)

Ms. Franklin was personally unavailable at the hearing to provide firsthand testimony; however, the Employer provided both testimonial and documentary evidence of the final incident that led to the Claimant's termination. Although the Claimant denied having any sexual meaning behind his conversation, he admitted having the conversation just the same. Evidence supports that Mr. Buckles had already been warned about making inappropriate comments to female employees, i.e., April 20, 2017 written warning and discussion about appropriate behavior in the workplace. (Exhibit 4) That warning carried a very specific caveat, "If there are *any more issues pertaining to conduct*, work performance, dress code, or attendance, *Bob will be terminated*." (Emphasis added.)

When Mr. Buckles made his comments to Ms. Franklin after he went to her office on May 14th, he should have known that his comments were questionable. Why else would he have to defend them by stating to her "…we don't judge anybody…" after telling her he likes to get with 'nasty people' and 'party,' then 'get on with our lives…"? Any reasonable person would construe his remarks to be that of a sexual nature even though he did not explicitly use the word 'sex' or other obvious terms. His argument that she distracted him from being unable to purportedly ask a legitimate business question when he came to her office in the first place appears to be a feeble attempt to blame her for the 'misunderstood' conversation. We find his explanation for the entire conversation not credible in light of his most recent infraction. And while the Employer's decision to terminate him was based primarily on this final incident, we can look to past acts to determine the seriousness of the incident that

resulted in his termination. Based on this record, we conclude that the Employer satisfied their burden of proof in that the Claimant intentionally violated company policy, again, after being warned.

DECISION:

The administrative law judge's decision dated July 12, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Kim D. Schmett

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James M. Strohman