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

KORESA I SERRANO	:	
	:	**HEARING NUMBER:** 10B-UI-12350
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
ELMORE FOODS LLC	:	
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: 96.5-1, 871 IAC 24

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Employment Appeal Board would modify the administrative law judge's Findings of Fact as follows:

The claimant began work for the employer on August 11, 2003, and last worked as a full-time assistant manager on July 10, 2010. (Tr. 2, 6) The employer has a progressive disciplinary policy from a verbal warning to a first, second and final written warning termination. (Tr. 3)

The claimant was issued a verbal (written) warning on April 25, 2010. (Tr. 3, 10) The employer withheld her bonus for the period from March through May due to the warning.

An employee (who did not participate in the hearing) reported to management seeing claimant kissing a former employee in the employer parking lot. (Tr. 3, 7) Owner Ketelsen discussed the issue with GM Baker. Ketelsen prepared a first written warning to the claimant for unprofessional conduct for the parking lot incident. Ketelsen confronted claimant with her conduct by stating she could accept the warning or resign with inducements of two weeks of severance pay and the withheld bonus of approximately $1,500.00. (Tr. 2, 4, 6, 7) Ketelsen told claimant he did not want her working for the business any longer, and he made some hurtful comments. (Tr.6, 9, 11) He told her that if she didn't resign and accept the bonus, he would "work [her] out of the system" and she would get no bonus. (Tr. 9) After fifteen minutes, the claimant submitted her written resignation that the employer accepted. (Tr. 3) The employee who reported the claimant's conduct had been harassing the claimant. (Tr. 7)

The Employment Appeal Board would modify the administrative law judge's Reasoning and Conclusions of Law as follows:

The claimant's contention she was forced to resign is supported by the facts. 871 IAC 24. 26(21) provides that if "[a] claimant [is] compelled to resign when given the choice of resigning or being discharged…[t]his shall not be considered a voluntary leaving." The employer "induced" her to resign in order to end the employment relationship, but she could have accepted the written warning and continued employment. However, given the employer's threat that he would work her out of the system, the claimant's prospect of continued employment would have been very dim. The inducements of severance pay and the release of bonus pay support claimant's contention that the employer told her he no longer wanted her to remain as an employee.

Under these circumstances, it is clear that given such options, the claimant had no choice but to resign, which in effect is tantamount to a discharge for which misconduct must be established.

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).

Based on this record, we conclude that the employer failed to establish that an act of unprofessional conduct occurred, or that if it did, it was anything other than an isolated act of poor judgment. Given this single incident for which the employer failed to provide any firsthand witness, and the fact that the claimant had only one other infraction against her that occurred several months prior, we conclude her behavior did not rise to the legal definition of misconduct.

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John A. Peno

_____
Elizabeth L. Seiser

AMG/fnv