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

TRUDIE J WOOD	:	
	:	**HEARING NUMBER:** 14B-UI-14335
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
GOOD SAMARITAN SOCIETY 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

The Claimant 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 additions, 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**:

FINDINGS OF FACT:

The Board makes the following findings of fact *in addition* to those of the Administrative Law Judge:

The Employer personally participated in the fact finding interview.

We also find that the dishonesty of the Claimant with Ms. Turner is clearly a *but for* cause of the termination of the Claimant's employment.

REASONING AND CONCLUSIONS OF LAW:

The Board makes the following conclusions of law *in addition* to those of the Administrative Law Judge:

To be clear, we agree with the Administrative Law Judge's analysis and findings and so are now only making additions to them, we continue to adopt them as our own.

As an initial matter the Claimant filed an argument with the Board but in the form of proposed findings and conclusions. It is unclear whether the Claimant was attempting to file proposed findings of fact and conclusions of law, or whether the Claimant was only formatting her arguments in this particular way. We note that if they are taken as proposed findings of fact and conclusions of law, they are not filed in accordance with agency rules. Our rules only permit proposed findings to be filed in OSHA cases. 486 IAC 4.76. We therefore treat it as argument.

Effect Of Request to Admit & Employer Appeal

The Claimant argues that the Employer's response to her request for admissions, and also the Employer representative's narrative in the appeal to the Administrative Law Judge mean that the Employer is limited to arguing that the Claimant's conduct on November 27 is the only conduct that can be considered when deciding if misconduct is proven. We reject the claims and naturally deny the motion to limit issues, at least to the extent that the proposed limitation is inconsistent with our discussion today.

As for the request for admission, we recognize that under 17A.13 the rules of discovery apply to an administrative contested case proceeding. The key problem for the Claimant's argument, however, is the wording of the admission. The request for admission here asked the Employer to admit "[a]ll of the employer's reasons for Trudie Wood's discharge are stated in the corrective action notice dated December 2, 2013." *Ex. 12.* The Employer admitted this. In the termination notice the Employer described the meeting of November 27, 2013 and that "you [Claimant] were asked how you were doing with the ordering process on DSSI, to which you mentioned your were having no problems…." *Ex. D.* The notice goes on to describe the conversation about training module completion and then states "I later learned that you have not ordered anything off of the DSSI system in over a year, and that the orders that you have been placing have been placed by telephone. Dishonesty in addition to the lack of progress in this area of your performance Improvement Plan are classified as a Group III offense resulting in immediate termination." *Ex. D.* Looking this over it is plain that the "employer's reasons for Trudie Wood's discharge," as stated in the corrective action notice, are "dishonesty" and "lack of progress" in this area of the PIP. The lack of progress did not all take place on November 27 and neither did the dishonesty. The Claimant did not ask "Admit that the only instance of dishonesty which was a factor in the decision to terminate Trudie Wood occurred on November 27" or anything similar. The reasons were asked for and the reasons were given, dishonesty and lack of progress on the PIP. Thus the Administrative Law Judge, and we, are perfectly well justified to look to the events of October 18 and 28 as part of the basis for concluding that the Claimant engaged in "dishonesty."

As for the appeal, the Administrative Law Judge is entitled to give less weight to statements made in the appeal when made by an employer representative. *See Cardenas v. ATT,* 245 F.3d 994 (8th Cir. 2001). In this case we agree with the Administrative Law Judge's judgment on the weight of evidence, in general. We note that it is black letter law that the Board "as finder of fact, is free to pick and choose from the record." *Stephenson v. Furnas Elec. Co*., 522 N.W.2d 828, 832 (Iowa 1994). Also the agency need "not detail and discuss the conflicting evidence in its decision." *Keystone Nursing Care Center v. Craddock*, 705

N.W.2d 299, 305 (Iowa 2005); *accord Iowa State Fairgrounds Sec. v. Iowa Civil Rights Com'n,* 322 N.W.2d 293, 295 (Iowa, 1982)(rejecting argument that agency must explain why it made different decision on weight of evidence than the hearing officer). More to the point, however, is that even looking to that appeal and giving it appropriate consideration we still find that it is insufficiently inconsistent with the Employer's evidence and position at hearing to undermine the credibility of the Employer's evidence in any significant way. 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 have found incredible the Claimant's claim that she was not intending to misled Ms. Turner, and we have found credible the evidence of the Employer, the testimony of Ms. Turner in particular.

Even if we were to feel bound by the request for admission to only consider the events of November 27 still this would not avail the Claimant. We find that even if the November 27 exchange were the only instance of dishonesty considered in the termination still we would disqualify. In *White v EAB* 448 N.W.2d 691 (Iowa App. 1989) a nurse made a charting error, perhaps as a matter of simple negligence that ordinarily is not misconduct. When she was questioned about it the employee "denied the situation and provided misinformation." *White* at 692. The Iowa Court of Appeals found substantial evidence to support disqualification based on "claimant's lack of candor when questioned about the incident." *White* at 692. Here we find that the Claimant was dishonest on the 27th when questioned by the Employer. She deliberately answered Ms. Turner so as to leave the impression that the Claimant had done something which she knew she had not. We are unconvinced that the Claimant was confused or the victim of some miscommunication. If you ask a salesman if a certain product is reliable and the salesman replies "I haven't had any complaints" you would conclude that he had lied to you if you found out he hadn't sold this product before. It is the familiar lie by intentionally creating a false impression, and by omitted selected facts. In the case at bar the Claimant *at the very least* was playing games with words in order to hide the truth. This is concealment of the truth, and a lie to her superior about matters directly affecting the evaluation of the Claimant's job performance. We find, as an alternative *in addition to* the Administrative Law Judge's analysis, that the Claimant's dishonesty on November 27 *alone* is disqualifying.

We note that where a termination results from two causes, it matters not if one is misconduct, or two. One need only be disqualified once. Had the legislature intended a different result it could have said as much in the statute. Several places in Chapter 96 the legislature referred to effects flowing "solely by reason of", §95.4(5)(b); §96.19(18)(a)(5), "solely due to", Iowa Code §96.7(2)(a)(2); §96.14(3)(f)(5), "solely for", Iowa Code §96.9(3); §96.13(1), and "solely because of." Iowa Code §96.19(16)(g). No such language is used to describe disqualification for a discharge due to misconduct. The legislature could have specified that a discharge must be "solely for misconduct" before a disqualification may be imposed. The legislature did not. The Claimant's dishonesty is disqualifying misconduct and it was a but for cause of the termination. *See Bridgestone/Firestone, Inc. v. EAB*, 570 N.W.2d 85, 91 (Iowa 1997).

Again we emphasize that this analysis is only in conjunction with that the Administrative Law Judge, and that we continue to agree with the learned judge's conclusions and findings.

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Kim D. Schmett

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Cloyd (Robby) Robinson

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Ashley R. Koopmans

RRA/fnv