

**BOARD OF REFEREES**  
Employment Insurance

**CONSEIL ARBITRAL**  
Assurance-emploi

**BOARD OF REFEREES DECISION**  
**DÉCISION DU CONSEIL ARBITRAL**

Case number - Numéro de la cause  
**10-0332**

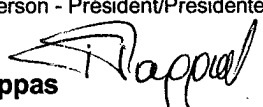
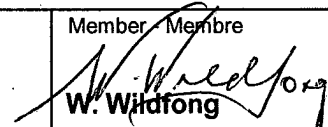
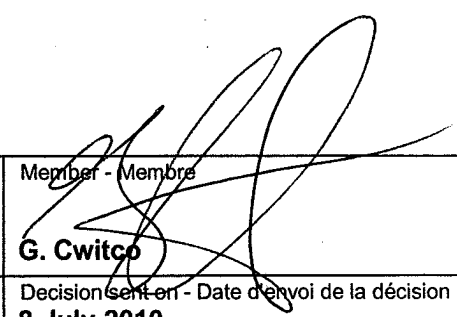
Name of appellant - Nom de l'appellant/appelante <b>Hua Cao</b>		File number - Numéro de dossier <b>-162-245</b>
Service Canada Centre address – Adresse du Centre Service Canada 35 Beresford Drive Richmond Hill On L4B 4M3		Place of hearing - Endroit de l'audience Appeals Centre: Boardroom 4 4900 Yonge St., 5th floor North York ON M2N 6A4
Attending parties and witnesses heard during the hearing with their title, in-person, teleconference, videoconference or on the record Parties présentes et témoins entendus à l'audience ainsi que leur titre, en personne, téléconférence, vidéoconférence ou sur la foi du dossier  HUA CAO – CLAIMANT DAVID PAYNE – CLAIMANT'S LAWYER		
Hearing audio recorded <input type="checkbox"/> Enregistrement de l'audience		Date 7-July-2010
<b>DECISION OF THE BOARD OF REFEREES -- DÉCISION DU CONSEIL ARBITRAL</b>		

**PARTIES:**

The appellant attended the hearing. The claimant's lawyer, Mr. Payne, attended the hearing. The hearing was not taped.

**THE ISSUE INVOLVED:**

Whether or not the claimant lost her employment by reason of her own misconduct, pursuant to Sections 29 and 30 of the Employment Insurance Act (hereinafter "the Act").

Chairperson - Président/Présidente <b>T. Pappas</b> 	Member - Membre <b>W. Wildfong</b> 	Member - Membre <b>G. Cwitco</b> 
Date decision signed – Décision signée le <b>7-July-2010</b>		Decision sent on - Date d'envoi de la décision <b>8-July-2010</b>

PROTECTED WHEN COMPLETED - B  
PROTÉGÉ UNE FOIS REMPLI - B

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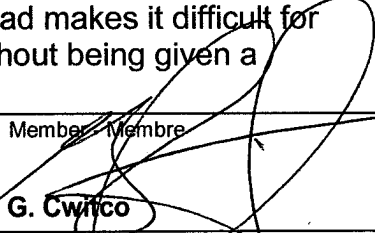
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**INFORMATION FROM THE DOCKET:**

An initial claim for employment insurance benefits was established effective March 14, 2010 (Exhibit 2). Evidence from Colortech Inc. is that the claimant's employment was terminated by the employer on March 10, 2010 because she intentionally skipped testing their product and falsified the test data to show that she had done the testing. She was a Quality Assurance Technician and the testing and recording of the test results was part of her job. She was well aware of this aspect of her job as she signed a copy of her position description when she started there. The most important issue was that she falsified the test results. She admitted that she did this. The reason she gave them for not testing the product was that she was too busy. She did not report to the management her concerns with not being able to complete her work in a timely manner. The other two Quality Assurance Technicians were able to do the required work without falsifying the test data. The number of technicians doing that work had decreased because a lot of the work was being done electronically. The company's investigations proved that she had skipped the testing and falsified the test data previously and they lost a customer due to quality issues with their product, created by the actions of the claimant's (Exhibits 6, 10 & 11).

The claimant was advised of the employer's statement and states that she was too busy to do all required testing. She tested one box in a set and used her expertise to estimate the test results for the rest of the boxes. She said she falsified the testing data to indicate that she had tested all the boxes but she didn't think this was actually falsifying the data because she estimated that the boxes were the same. She only did this when she was busy. The customers complained a lot due to the system, not her work. She reported to her supervisor in the past that she was overworked but he did not provide any solutions to the problem. There was no support. She usually skipped her lunch break to get the work done. She has suffered from asthma for a long time and the workload makes it difficult for her condition. She never had any warnings and was terminated without being given a chance. She was treated unfairly.

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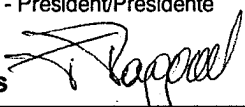
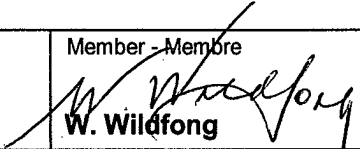
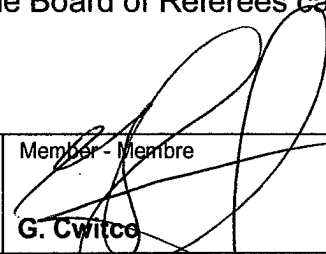
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**INFORMATION FROM THE DOCKET CONTINUED:**

The supervisor had made a mistake 5 years prior which caused a whole lot of boxes of product to be rejected but he was not punished. She was forced to sign an improper performance review which she rejected. In March 2009, she reported assault by the production foreman and she believes that they were trying to get rid of her as a result. In May 2009 she reported to the Human Resources Manager verbal abuse from another employee. In November 2009 the same employee called her "garbage" in front of the management and other staff and the Human Resources Manager laughed. She reported these issues to the labour board (Exhibits 4, 5 & 7).

The Commission concluded that the claimant's actions of skipping steps in the quality testing procedures and falsifying the data reports to show that she did not skip those steps constituted misconduct within the meaning of the Act because she deliberately did this, more than once, knowing that she was not following her job procedures and knowing that it would create a breach of her relationship with her employer if she was caught. She did not tell her supervisor what she was doing because she knew he would not accept it (Exhibit 7). As a result the Commission imposed an indefinite disqualification effective March 7, 2010 pursuant to subsection 30(1) of the Act (Exhibit 8).

The attention of the Board of Referees is drawn to the fact that a clerical error was made in the notice sent to the claimant (Exhibit 8). This notice indicates the claimant cannot be paid regular benefits starting March 7, 2010 whereas it should have stated March 14, 2010, the date that her claim commences. The Federal Court of Appeal in **A-128-89** confirmed the principle, established by Justice Pinard in **CUB 16233** that an error which does not cause prejudice is not fatal to the decision under appeal, and therefore the Board of Referees can and should maintain the decision.

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**INFORMATION FROM THE DOCKET CONTINUED:**

The claimant disputes the Commission's decision stating that the reason for her dismissal was not her misconduct, including falsification of test results. She was terminated due to her complaints about sexual harassment and discrimination. She was overworked and advised "the management that the intensity of work far exceeded the workload stipulated in the Employment Standards Act." She was harassed by another technician. None of these problems were addressed by the employer. Her job performance was not unsatisfactory prior to her last day there and she had not been informed that there were any concerns regarding her performance (Exhibit 9).



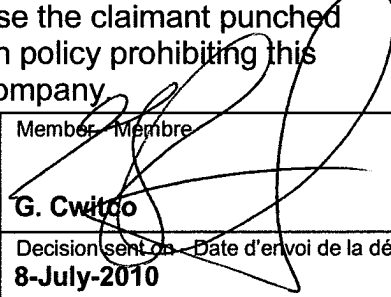
**EVIDENCE AT THE HEARING:**

The Board heard evidence during the hearing.

Mr. Payne submitted documentary evidence (case law) that was entered as Exhibits 15 to 20.

The claimant submitted that there was no ill intention or willfulness on her part when she performed her duties. She was simply overworked. Her lawyer submitted that **CUB 66669** supports his client's position. In that case the claimant had not deliberately neglected his duties, but he was overloaded and disorganized.

The second point the claimant made, was that because there was only 3 QA employees instead of 5, all three were cutting corners to keep up with the production line. They were checking 1 out of 3 boxes and based on that result they estimated the others. Mr. Payne submitted that **CUB 66554** supports his client's position. In that case the claimant punched the time card of another employee which goes against an unwritten policy prohibiting this practice. However he stated that this was commonly done in the company.

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**-162-245**

**EVIDENCE AT THE HEARING CONTINUED:**

The Umpire concluded that the claimant's testimony has greater weight because it is the employees who have to punch their time cards and who do so regularly. Practices can develop at this level without the employer's knowledge.

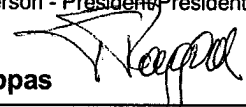

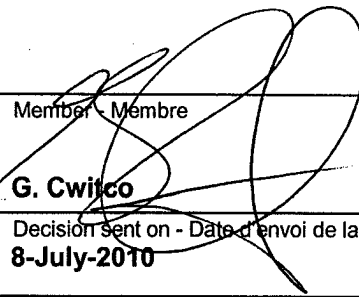
Mr. Payne went on to submit that as demonstrated in **CUB 41426B**, unsatisfactory performance does not constitute misconduct.

**FINDINGS OF FACT, APPLICATION OF THE LAW:**

Subsection 30(2) of the Act provides for an indefinite disqualification when the claimant loses her employment by reason of her own misconduct. For the conduct in question to constitute misconduct within the meaning of Section 30 of the Act, it must be willful or deliberate or so reckless as to approach willfulness. There must also be a causal relationship between the misconduct and the dismissal.

The Board found the claimant to be straight forward and honest. We considered her evidence to be clear, cogent and compelling. The Board prefers and assigns more weight to the direct evidence of the claimant. She testified that all three QA employees were cutting corners to keep up with the production line. They were checking 1 out of 3 boxes and based on that result they estimated the others. There was no ill intent or maliciousness on their part.

In Exhibit 11-12, the letter of termination, the employer characterized the claimant's conduct as "an error in judgment," which does not constitute misconduct under the "Act".

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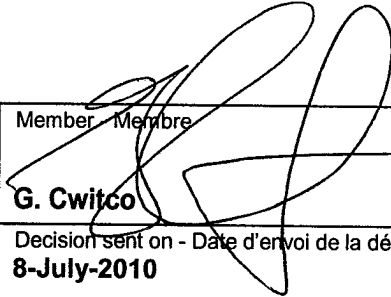
**FINDINGS OF FACT, APPLICATION OF THE LAW CONTINUED:**

In **CUB 66554**, the claimant punched the time card of another employee which goes against an unwritten policy prohibiting this practice. However he stated that this was commonly done in the company. The Umpire concluded that the claimant's testimony has greater weight because it is the employees who have to punch their time cards and who do so regularly. Practices can develop at this level without the employer's knowledge.

The Board finds as a fact that the claimant did not lose her employment by reason of her own misconduct, pursuant to Sections 29 and 30 of the Employment Insurance Act (hereinafter "the Act").

**DECISION:**

The Board unanimously **ALLOWS** the appeal.

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