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

ERIC MOCKMORE DELANO	:	
	:	**HEARING NUMBER:** 21B-UI-12551
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
WEST LIBERTY 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: 96.5-2-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. 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:

Eric Mockmore Delano (Claimant) worked for West Liberty Foods (Employer) as a full-time lung gun cropper rotator from July 3, 2019, until he was fired on April 19, 2020.

On April 19, 2020, the Claimant was walking out of the plant while speaking to his spouse, Kaitlynn Marshall-Delano. Human Resources Director Karen Taylor ("Taylor") and Plant Manager Tom Alberpi were following closely behind him. The Claimant was off the clock at this time.

As Claimant was on the phone he spoke about how frustrating it was that he had to work unexpectedly because there was a problem with the production line, and that he was the only one who could pick up his son at school due to the fact he had the couple's only vehicle. Claimant also complained about West Liberty Foods' procedures regarding mitigating the spread of Covid19 in the plant. Claimant said to his wife on the phone that "if someone was going to get sick West Liberty Foods was just going to hire somebody else." The Employer has not shown that the Claimant said this in a markedly loud voice, or that he said this with the intent that it be overheard.

Mr. Alberpi heard this remark between spouses. He then asked Claimant what he had just said. Claimant replied, "Well I think that it is bullshit," or words to that effect. Claimant left the building. Claimant continued to walk out to his car. Mr. Alberpi followed, even though Claimant was then off the clock. Mr. Alberpi grabbed Claimant's shoulder and Claimant exclaimed, "Get the fuck away from me." Mr. Alberpi then told Claimant that if he did not like working there, then there was no need for him to come back.

Claimant was scheduled to take vacation on the following day, April 20, 2020. On April 21, 2020, Claimant returned to work. On that date, Mr. Alberpi told the Claimant he had been terminated on April 19, 2020.

The Claimant had no prior warning over his use of language or for aggressive/disruptive behavior.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2021) 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.

"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).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). 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 considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Claimant's testimony, and that of his witness, and have based our findings on this testimony. Where there are minor conflicts between these two we generally accept the testimony of the Claimant over his spouse. The Claimant was there in person, and the spouse had a lesser opportunity to hear what was being said. Thus, for example, we have found "fuck" was used since the Claimant admitted this. The Employer presented only hearsay concerning the final incident, and much of that testimony was not very confident.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors…." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983). We have no citation for discriminatory content, but have no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.

Here we have an employee on the phone to his spouse complaining about work after hours. This is virtually a national pastime. As the Iowa Court of Appeals said:

> Complaining about one's boss during off-hours is an ubiquitous American tradition: from Johnny Paycheck's lament in 'Take this Job and Shove It' that 'the foreman he's a regular dog, the line boss he's a fool,' to Dagwood's precarious relationship with Mr. Dithers in the comic strip Blondie, to Homer's venting about Mr. Burns on *The Simpsons*. Not all dissent by an employee should result in the denial of unemployment benefits.

Nolan v. EAB, 10-0678, slip op. at 14 (Iowa App. 2-9-11). The claimant in the *Nolan* case was complaining to a vendor about her boss, and called her supervisor a "bitch" the day after she was told not to. Yet still she was given benefits by the Court of Appeals. Our point is that employees who are of the clock can pretty much complain as much as they want about work to their spouses. Any other ruling would not only be of questionable legal validity, but would be immensely impractical.

Nevertheless, the Claimant was on the phone while still on work premises and he was overheard complaining about work. Notably this complaint was not obscene or personal, just a general complaint about working conditions at food processing facility at the height of the Pandemic. Mr. Alberpi then decided to confront the Claimant over his conversation with his spouse. The business purpose of this decision has not been made clear by the Employer.

Once the Claimant was asked to describe his conversation with his spouse the Claimant referred to the situation at work as "bullshit." Perhaps he should have said, "None of your business." Many people would have. Instead he cursed. This cursing, however, was not directed to Mr. Alberpi personally, nor has the Employer shown that anyone but the two involved in the conversation could have overheard this word.

The Claimant then left the building apparently while displaying body language conveying that he was upset. Many people, confronted over their phone conversation with their own spouse, would be. We naturally do no disqualify for angry walking. Mr. Alberpi chose to follow the Claimant and to continue the confrontation. The business purpose of this decision also has not been made clear by the Employer.

Then Mr. Alberpi chose to get the Claimant's attention by grabbing his shoulder. Again, we struggle to find a legitimate employer's interest in doing this. We recognize Mr. Alberpi is human, and would naturally be sensitive to criticism of COVID mitigation measures. We are aware that about this time such criticism had gone nationwide, and that within ten days after the incidents in question the President of the United States issued an executive order that food processing plants must remain open. So, of course, Mr. Alberpi was under a lot of pressure. But so was the Claimant.

The Claimant then told Mr. Alberpi, in reaction to being followed, grabbed, and confronted over his own opinions, to "get the fuck away from me." Here the word "fuck" is used as an adverbial intensifier, in order to emphasize Claimant's displeasure at being grabbed while on his own time, and while trying to leave work. He did not call Mr. Alberpi a name, but used profanity to punctuate his displeasure with Mr. Alberpi's actions.

The reactions, and the reactive use of profanity of the Claimant in this context, does not in our opinion rise beyond the level of an error of judgment. This is confirmed by applying the relevant factors to this case.

First, the Employer has not proven that a customer, vendor, or third party overheard. Second, on the "bullshit" remark the Claimant was cursing about work but he was not cursing in response to a directive from management. He was upset about working conditions during a pandemic, and he used a fairly mild curse when *asked by management* to expound of his dissatisfaction. Moreover, he was being confronted over something he had said to his spouse on his own time, and any reasonable person would be upset by the presumptuous nature of this. As for the "fuck away," it was in response to being grabbed. We do not find that the Claimant was acting in a way to undermine management *legitimate* authority. Maybe he undermined management's ability to regulate his conversations with his spouse, or to lay hands on him, but we do not think that this weighs in the Employer's favor. Third, there were no threats of violence. Despite being grabbed, the Claimant did not react in kind, nor

express that he would. No doubt he spoke forcefully in reaction to the grab, but not every forceful action is a threat. We find there was no threat made, so this factor weighs against disqualification. Fourth, the Claimant did not state that he planned to disobey management in the future, or to make life difficult for management, or to take any similar action. Rather, the Claimant was upset about management's behavior, and while off the clock and being forcefully confronted about his personal opinions he cursed twice. Fifth, we must consider whether the profanity was repeated. We view this as a single outburst of profanity, and not a repeated instance as was seen in *Carpenter*, the case cited by *Myers*. In *Carpenter* the Claimant told his own supervisor to "kiss [my] ass." The Court explained that had Mr. Carpenter stopped at this point he might have an argument against disqualification. "However, petitioner, upon seeing and visiting with his crying wife, went to his wife's supervisor and said 'I am going to tell you the same thing I told Joe. You guys can all kiss my ass.'" *Carpenter* at 245. This was about thirty minutes later. *Id.* So in *Carpenter*, the case establishing the fifth factor, the employee cursed two separate supervisors thirty minutes apart, and in a studied way. Our case has two curses over a span of minutes. And it happened twice, frankly, because the Employer kept pushing it. We do take into account that this single transaction contained multiple bad words. Yet this is not the same sort of repetition - two different supervisors cursed at two different times - that was seen in *Carpenter*. The Claimant had no prior warnings for anything similar. On the sixth factor, no one argues the Claimant said anything discriminatory.

Finally, the job environment favors the Employer as cursing was not allowed. Weighing the Claimant's favor on this point was he was on the way out, and in the parking lot when he made his remarks. Also the Claimant presented evidence that a similar level of profanity in the past was not punished.

In the end, we have a worker expressing his personal frustrations to his spouse, and an employer who sees fit to confront him over it. The Employer follows him, and grabs him in escalation of the confrontation. Frankly, it is not particularly surprising that cursing would result. Add to this the stress of performing this job in the Spring of 2020, and we see no more than an isolated incident of poor judgment. And we cannot overlook that the Claimant isn't the only one who showed poor judgment that day. Even taking into account the listed factors, we find the Employer has failed to prove a *deliberate* violation or disregard of standards of behavior which the employer has the right to expect of employees. We note, as we have often done, that conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552, 554 (Iowa App. 1986); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983); *Newman v. Iowa Dept. of Job Service*, 351 N.W.2d 806, 808 (Iowa App. 1984). This case falls into that category and we accordingly allow benefits today.

DECISION:

The administrative law judge's decision dated December 30, 2020 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.

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James M. Strohman

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Ashley R. Koopmans

_____
Myron R. Linn

RRA/fnv