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

ROBERT K BREWER	:	
	:	**HEARING NUMBER:** 13B-UI-05093
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: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, 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 K. Brewer, worked for Hy-Vee, Inc., as a part-time meat clerk from May 15, 2012 through April 8, 2013. The Employer has a zero-tolerance policy that prohibits the use of profanity in the workplace. As for other infractions, the Employer generally uses a progressive disciplinary approach prior to terminating an employee. The Claimant received a copy of all policies a handbook that he signed in acknowledgement of receipt when he started his employment. (Employer's Exhibit 1, unnumbered p. 2)

On April 8, 2013, the Employer overheard the Claimant and the meat manager (Matt Robben) talking in raised voices. The Employer overheard the Claimant repeatedly use the 'f-ck' word, 'ranting and raving' that the manager didn't know what he was doing. Robben directed him to come to the back away from customers. Several employees overheard the fray and left their posts to see what was going on.

The Employer asked the Claimant to settle down and wait for him to return from meeting with other employees so that they could discuss the matter. The Claimant did not wait, and instead left the premises. Although the Claimant had no prior warnings, the Employer terminated him for violating the zero-tolerance policy against profanity, particularly within earshot of customers and employees. The Claimant apologized for cussing citing 'low blood sugar' as the reason for his behavior. He tried to get his job back to no avail.

REASONING AND CONCLUSIONS OF LAW:

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).

Both parties acknowledge that the Employer has a zero-tolerance policy for which termination could result. Additionally, the Claimant admitted that he used profanity towards Mr. Robbens on April 8, 2013. Mr. Brewer's argument that he acted so brashly because he, essentially, wasn't feeling well (low blood sugar) lacks merits. He could have told the Employer he wasn't feeling well, and gotten permission to go home. Rather, his belligerent outburst within earshot of customers and co-workers went directly against the Employer's interests. His profane attack on the meat manager was not only loud and antagonistic, it prompted immediate attention from other people in the area, and created a hostile environment. The Employer has a right to expect civility among its employees. Any reasonable person would know that such behavior would not and should not be tolerated in the workplace, hence the zero-tolerance policy. The fact that Mr. Brewer had no other infraction on his employment record is irrelevant considering the gravity of his highly and negatively charged outburst. The Claimant does not dispute his behavior. Based on this record, the Board would conclude that the Employer satisfied their burden of proving disqualifying misconduct.

DECISION:

The administrative law judge's decision dated June 6, 2013 is **REVERSED**. The Claimant was discharged for disqualifying misconduct. Accordingly, the Claimant 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".

Lastly, because the claimant has received two consecutive agency decisions that allowed benefits, the claimant is now subject to the double affirmance rule.

Iowa Code section 96.6(2) (2007) provides, in pertinent part:

> ...If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision in finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5…

The rule itself specifies:

> Rule of two affirmances.
>
> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
>
> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

In other words, as to the claimant, even though this decision disqualifies the claimant for receiving benefits, those benefits already received shall ***not*** result in an overpayment.

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John A. Peno

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Monique F. Kuester

DISSENTING OPINION OF CLOYD (ROBBY) ROBINSON:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Cloyd (Robby) Robinson

AMG/fnv