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

CHARLES M JOHNSON Claimant, and **HY-VEE INC** Employer.	:	**HEARING NUMBER:** 14B-UI-04861 **EMPLOYMENT APPEAL BOARD DECISION**

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, 96.6-2

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own. The Board finds in addition:

> The "employee break" area was actually just the customer dining room open to the general public. The Claimant and Heide only rarely had contact during work time as he was in the store demonstrating food, and she was generally up front as a cashier.

REASONING AND CONCLUSIONS OF LAW:

We adopt the Administrative Law Judge conclusions of law as they apply to the timeliness issue only. On the issue of misconduct we make the following findings.

Iowa Code Section 96.5(2)(a) (2013) 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).

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). "An isolated incident of vulgarity can

constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). 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). "[A]busive language directed to a supervisor can be a form of insubordination which alone may be construed as disqualifying misconduct. *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986). 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. IDJS*, 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.

Reviewing the record and even considering the Claimant's history of discipline we cannot find that the final act rose to the level of misconduct. In general, off-duty conduct can be disqualifying under two theories. Conduct that is contrary to established policies of the employer, or prior warnings, may be disqualifying even if the conduct is away from work. *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416 (Iowa 1992)(drug offense). Also, where an employee commits acts that impair the employee's ability to function on the job this can be misconduct even if the acts do not occur at work or during work hours and there is no specific governing policy. *See Cook v. IDJS*, 299 N.W.2d 698, 702 (Iowa 1980)("While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye.") This case has neither aspect to it. While the Claimant had been warned to avoid certain topics while on work time this conversation was not on work time. And even if the Employer had given a directive governing off-work conversations we cannot find the Employer has a right to give a worker a blanket rule to avoid completely non-work related topics while on their own time. As for the impairment of the Claimant's ability to do the job there clearly is no connection between the Claimant's job duties and this conversation. Had the conversation been abusive then it could have impaired the Claimant's ability to work with his co-worker, and more to the point, it would have run afoul of the Employer's harassment policies, which legitimately would cover non-work time conversation with co-workers. The issue now becomes whether the Claimant intentionally had a conversation that was abusive, or was so negligent in having such a conversation so as to be equally culpable to intentional misconduct.

At the heart of this case is the Claimant expressing to a co-worker that he did not agree with the ELCA's policy on ordination and marriage of gays. (Notably that co-worker did not even recall the marriage aspect as her statement only mentions ordination). He did this when that co-worker mentioned that she was an ordained minister with the ELCA. The Claimant clearly did not intentionally try to harass his co-worker by making this statement because, as the Administrative Law Judge found, he was unaware that his co-worker was gay when he said this. As for negligence we cannot find that this statement is so inherently objectionable that a reasonable person would know, beforehand, that saying this to a co-worker in casual conversation away from work would create a hostile working environment. Indeed, even Heide's statement suggests that she was worried about the possibility of harassing statements made by the Claimant in the

future if he found out about her sexual orientation. This, of course, presupposes that the Claimant would engage in such conduct, and we do not disqualify based on the possibility of future misconduct.

In some ways this case is similar to the case of *Nolan v. Employment Appeal Board*, No. 10-0678 (Iowa App. 2/9/2011). In that case Ms. Nolan worked as a residential care manager and she was supervised by Director Brankovic. Ms. Nolan did not like the director. She called Brankovic a "bitch" on a voice mail she left with a vendor. Director Brankovic found out about this, met with Nolan, warned her, and told her to stop calling Brankovic a bitch. Ms. Nolan, the next day, called one of *her* subordinates to complain about Brankovic. She again called Brankovic a "bitch." This conversation, however, took place before work hours. The Board denied benefits, but the Court of Appeals reversed. In reversing the Court emphasized that misconduct must be work-connected and that even a conversation between co-workers, about work, but which is away from work is not misconduct. The Court found that complaining about work to co-workers and after work hours is generally not misconduct:

> 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, slip op. at 14. We note that "bitch" is a sexist term, and Ms. Nolan was using the term in conversation with a woman. In the case at bar no slurs were uttered, and no elaboration of the Claimant's beliefs were made. He expressed his opinion on ordination and marriage, and then the conversation moved on. Further the Claimant here was not criticizing his employer, much less cursing his employer, but was expressing his private beliefs. We, of course, do not agree nor disagree with what the Claimant said, because fundamentally that is simply not an issue in this case. The only issue is whether this remark, in context, and given the Claimant's history was disqualifying misconduct. In the end, we simply do not think it rose to the level of misconduct. It is black letter law that while an employer may have compelling business reasons to terminate a claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983) *accord Miller v. Employment Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa App.1988)("[D]istrict court erred in only focusing on whether petitioner's discharge was justified.").

DECISION:

The administrative law judge's decision dated June 12, 2014 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. The overpayment entered against the Claimant in the amount of $571 is vacated and set aside.

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Kim D. Schmett

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Ashley R. Koopmans

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

RRA/fnv