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

JOELINE M LOHSE	:	
	:	**HEARING NUMBER:** 16B-UI-03812
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
COLLIS 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, 96.5-1

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:

Joeline Lohse (Claimant) worked for Collis, Inc (Employer) as a resistance welder operator from September 17, 2007 until she was fired on March 8, 2016. Her job duties included using the forklift to get product and supplies to and from the production line.

On March 7, 2016, the Claimant moved over 100 parts from the production line to where they were being stored. It was part of her job duties to scan in the finished product. Claimant had performed these job duties on many occasions. Claimant told her supervisor during her shift that she would do it if she had enough time. The Claimant had in the past regularly scanned the product at the end of shift. On this night the Claimant was very busy, and had informed her supervisor that she may not have time to do the scanning. At the end of shift the scanning was not done because the Claimant ran out of time, and the Claimant informed her supervisor of this.

On March 4, 2016, co-workers reported that the Claimant was driving the forklift recklessly that night. Claimant used profane language a couple times that night as she was driving the forklift. Use of profane language at the Employer is common. The Employer has not proven that the Claimant recklessly drove the forklift.

The Claimant was discharged for accumulating in excess of the allowable conduct points. The incident of March 4 did not result in the Claimant exceeding the allowable points, and so was a necessary ("but for") cause but not a sufficient cause of the discharge. The incident of March 7 was the precipitating cause of the discharge, and it was both sufficient and necessary for the termination.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) 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).

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. In particular we find that the Employer did not prove reckless driving of the forklift in light of the Claimant's denials. At most we have a mistake in how the forks were lowered, but this is a single act of ordinary negligence which is not disqualifying. We also find credible the Claimant's explanation of her actions on March 7, and that she normally had scanned at the end without consequence, and that she made the supervisor aware that she would not have time to do the scanning. Since the supervisor did not object, and since the Claimant was doing the best she could on that night, we find neither insubordination, nor refusal to follow directions, nor carelessness in this final incident. *Lee v. Employment Appeal Board*, 616 NW2d 661, 668 (Iowa 2000)("quantifiable or objective evidence" needed for slip in performance to be misconduct); *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552 (Iowa App. 1986)(poor performance not misconduct). We need not consider the events of March 4 since the final incident that caused the termination was not misconduct. The March 4 events would not have resulted in termination if the March 7 events had not *subsequently* taken place.

Even looking to March 4 we find no misconduct. The cursing does not rise to the level of misconduct based primarily on the factor of the general work environment. The Claimant's cursing is, in *context*, no more than "good faith errors in judgment." 871 IAC 24.32(1)(a). Such good faith instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App.1986); 871 IAC 24.32(1)(a). As discussed above, reckless driving was not proven.

Even considering the events of both days together, and in light of the Claimant's discipline history, still we find that willful and wanton disregard of the Employer's interest by the Claimant was not proven, and we cannot find misconduct on this record.

DECISION:

The administrative law judge's decision dated April 19, 2016 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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Kim D. Schmett

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James M. Strohman

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

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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Ashley R. Koopmans

RRA/fnv