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

JOSEPH P MOONEY	:	
	:	**HEARING NUMBER:** 10B-UI-01271
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, 96.3-7

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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Joseph P. Mooney, was employed by West Liberty Foods, LLC from September 15, 2008 through December 15, 2009 as a full-time maintenance mechanic. (Tr. 3, 18) The claimant's job duties consisted primarily of "…doing maintenance work on ready-to-eat food equipment…slicers and packaging machines…" (Tr. 3) On November, 30, 2009, the employer distributed an updated handbook that contained an old provision that prohibited "…the use of abusive or threatening language or gestures towards others…" (Tr. 5) Employees were expected to indicate on the signoff sheet that each received a copy of the handbook. (Tr. 5, Exhibit 1)

The claimant had an ongoing problem with a co-worker named Trevor Fuhlman about whom Mr. Mooney complained to management regarding the intimidating manner that Trevor spoke with the claimant and other employees. (Tr. 10-11, 20, 25) On occasion, the claimant heard Trevor swear at other employees (Tr. 21), which was not unusual because it was not uncommon for people to swear in the workplace there. (Tr. 22-23) The employer inquired about Trevor's demeanor, but did not formally document any concerns. (Tr. 10) Trevor was eventually promoted to maintenance supervisor over the second shift, which often overlapped with the claimant's shift because of overtime. (Tr. 12)

On December 15, 2010, the claimant spoke with Maria Bozaan (Human Resources Manager) about FMLA-type benefits because he was expecting a baby in a few weeks. (Tr. 7-8) He also mentioned that he might be leaving the company at the end of February, as Oscar Meyer offered him a job paying $2.00 more an hour. (Tr. 7-8, 23, 27)

Later that same day, the claimant was assisting another employee's (Eli) line three along with Art (Tr. 18) when the line went down as a result of what Mooney believed was another employee's error; the stroke on the machine needed adjusting. (Tr. 18, 19, 21) The claimant was down by the motor and Trevor came into the area inquiring if Mooney knew how to make the adjustment. (Tr. 13, 19) Mooney did not respond (Tr. 13), and instead asked him if he (Trevor) wanted to fix it, himself. (Tr. 19) Trevor directed the claimant to go into the shop whereupon the two men got into a heated verbal exchange that included the use of profanity. (Tr. 3, 4, 7, 12-15, 19) Trevor told Mooney to go to the Human Resources office, where it was recommended that the claimant be suspended pending further investigation into the matter. (Tr. 6) The claimant had no prior warnings issued against him for any infraction. (Tr. 9) The employer questioned two witnesses who were working on the line with Mooney at the time it went down. (Tr. 6) On December 22, 2010, the employer terminated Mooney for violating a company rule, i.e., use of abusive or threatening language. (Tr. 4-5) No other employee had ever been discharged for the use of profanity

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).

The record establishes that the claimant got into a heated argument with Trevor, a supervisor, who was also an employee that Mooney had problems with in the past. Although the employer denies that Trevor was ever a problem in that regard, the claimant controverted that testimony stating that not only did he witness Trevor cussing at other employees, it was common practice for employees to cuss in the workplace. Given the type of environment in which the parties worked, we find it credible that the use of profanity was common practice even though a company rule prohibiting it existed.

The claimant vehemently denies that he used profanity in a threatening manner against Trevor. While both parties agree that the men's confrontation escalated and resulted in the claimant's suspension, the employer failed to provide the two witnesses, admittedly still employed and within the employer's control (Tr. 9), at the hearing to corroborate Trevor's allegation that it was Mooney who was threatening and abusive. According to Mooney, both Art and Eli who were also working on the line at the time, were excused from the area (tr. 19) and weren't a party to the December 15th incident when the claimant and Trevor proceeded into the shop where their argument escalated. Assuming arguendo that Mooney was the sole, threatening 'abuser' during this interchange, we would consider it to be an isolated instance of poor judgment that didn't rise to the legal definition of misconduct, particularly in light of Mooney's lack of any prior disciplines. While the employer may have compelling business reasons to terminate the 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).

In addition, we are mindful that the employer's harsh discipline also occurs on the heels of the claimant announcing his intention to sever his employment relationship several months away. (Tr. 9, 23, 27) While it is speculative that the employer's decision to terminate Mooney may have been two-fold, it does

not factor into our decision.

DECISION:

The administrative law judge's decision dated July 27, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

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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Monique F. Kuester

AMG/kjo