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

DEBORAH G TAPLIN	:	
	:	
Claimant,	:	**HEARING NUMBER:** 15B-UI-00635
	:	
and	:	
	:	**EMPLOYMENT APPEAL BOARD**
BRAD DEERY MOTORS	:	**DECISION**
	:	
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 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Deborah Taplin (Claimant) worked for Brad Deery Motors (Employer) as a full-time internet salesperson from January 30, 2012 until she was fired on December 23, 2014. The Employer receives sales leads through the internet which are assigned on a rotating basis to salespersons. From time to time a leads is not assigned automatically and manager Chris Nelson is responsible for resolving the lead by assigning to a salesperson. If a customer had been assigned to a salesperson in the past then the general practice is to assign that lead to the same salesperson. Once sufficient time has passed without activity from that customer, however, the lead is just assigned to whomever is next on the rotation.

On March 5, 2014 the Claimant told a co-worker to "shut the fuck up." The Claimant was sent home for three days without pay for this. On August 4 of 2014 the Claimant was disciplined for arguing with a co-worker, although the Claimant again denied she had said anything wrong. The Claimant was sent home for

the day without pay. In November 2014 the Claimant argued with the human resource manager and was written up for insubordination and for disrespectful interaction with co-workers. She was warned at that time this was a final warning.

On Saturday, December 20, 2014, the Claimant was working with a co-worker, Brandy Brennan. Manager Chris Nelson was not there and had left Brandy in charge for resolving internet leads that day. Ms. Nelson assigned a lead according to rotation rather than assigning it to the Claimant. The Claimant felt she was entitled to be associated with the sales lead based on her prior history with that customer. First, the Claimant accessed information after being told by Ms. Brennan that she was not permitted to, saying "I can do whatever the fuck I want." The Claimant then questioned Ms. Brennan about the resolution of the lead saying "why the fuck would you do that?" and then told Ms. Brennan "you can't fucking do that." Chris Nelson, the internet sale manager, received a phone call from both the Claimant and Ms. Brennan wanting to discuss the exchange. On Monday December 22 Mr. Nelson sat down and questioned both the Claimant and Ms. Brennan. After talking to both participants, Mr. Nelson fired the Claimant for her actions during this confrontation.

While the Employer has a video camera on site, the greater weight of the evidence supports that no audio would be on the video and that by Monday the Saturday video would be recorded over.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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). 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). An offensive comment can be misconduct even where the target of the comments are not present. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). Not all factors need to be present in order for misconduct to be shown. The consideration of these factors can take into account the general work environment and other factors as well.

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. We have found credible the Employer's evidence that the Claimant did in fact say what Ms. Brennan reported. We recognize the Employer relies on hearsay evidence, and we have taken this into account. We closely examine hearsay evidence in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14. Here the Employer is presenting through its representative the results of conversations held by its manager with the two involved parties. That evidence is fairly detailed and specific, certainly what the Claimant is alleged to have said is specific and not just a generalized description. We note that while the Administrative Law Judges at Workforce have routinely allowed reading a document into the record even if it was *not* sent in as an exhibit prior to hearing, the Administrative Law Judge in this case did not allow that. We are unclear why not. *See Jordan v. EAB,* No. No. 13-1380, slip op. at 6 (Iowa App. 10/29/2014)(Affirming finding of misconduct in case where "[t]hough the statement was not admitted into evidence, the employer's witness read the statement, dated April 4, 2012, into the record…"). In any event the information in the record is the sort of information that managers rely on in making decisions every day. We find that the hearsay offered by the Employer is the sort of information that reasonably prudent persons are accustomed to relying on for the conduct of their serious affairs. It is thus admissible.

Even where hearsay is sufficiently reliable to be admissible under 17A.14, the weight to give the evidence must be determined. "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005). Among the other factors is the opinion of the Administrative Law Judge. We note that the Administrative Law Judge conducted a telephone hearing and so did not personally observe the demeanor of the witnesses. While we always give appropriate weight to the credibility call of the Administrative Law Judge, that weight is correspondingly greater in in-person hearings, a factor not here present.

The record shows that the witness for the Employer conducted an investigation and spoke directly with the Claimant and Ms. Brennan. He took a written statement as soon as he was back in the office, only two days after the incident. Ms. Brennan's statement details what the Claimant did and what she said. Further, hearsay from other sources support that the Claimant had three other instances of run-ins with co-workers, including prior use of "fuck" when arguing with a co-worker. As hearsay goes, this is much more reliable than a one-sentence conclusion from an eyewitness reporting illegal activity taking place on a darkened patio – as was found reliable in *Grover v. Employment Appeal Board*, (Iowa App. 6/27/2007). Indeed, one factor in *Grover* also present here is that multiple sources of hearsay contradict the Claimant. Here three different people (at least) on four different occasions report similar behavior by the Claimant which she denied. In *Grover* there were only two sources. On balance we find the Employer's evidence, hearsay though it be, to be credible.

Given the final incidents of cursing being proven, we have little trouble finding misconduct. The Claimant on that final day disregarded instruction about access to the lead while cursing. She then angrily cursed a co-worker, who had been placed in charge of leads, twice more. This is repeated profanity in a confrontational and disrespectful context. This was significantly exacerbated by the fact that she had been repeatedly warned for the same type of behavior. Given the repeated nature of the comments, their vulgarity, and the challenge to authority in the November and December incidents, we find the Employer has proven misconduct.

DECISION:

The administrative law judge's decision dated February 11, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Kim D. Schmett

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James M. Strohman

DISSENTING OPINION OF ASHLEY 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. I find the Claimant's evidence more credible and thus would find no misconduct proven.

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Ashley R. Koopmans

RRA/fnv