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

TRUDI J SNYDER Claimant and **IOWA WORKFORCE DEVELOPMENT** Employer	**HEARING NUMBER:** 18BIWDUI-0033 **EMPLOYMENT APPEAL BOARD** **DECISION AFTER GRANTED REHEARING** **NUNC PRO TUNC**

N O T I C E

THIS DECISION BECOMES FINAL unless a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

SECTION: 96.5-2-A, 871.26

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

STATEMENT OF THE CASE:

The Claimant filed an application for rehearing on the above-listed matter that was granted. A Decision and Order was sent to both parties indicating the Claimant did not receive the complete set of CDs containing the recording of the January 16, 2018 hearing, and the one CD she did receive came just one day prior to the due date of her written argument. The Board found good cause to reconsider this matter, and resent a copy of the CDs allowing the Claimant ten (10) days from the date of the Order to submit her written argument. The Claimant submitted her written argument, which the Board has reviewed. The Board is now ready to issue its decision.

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by Board as its own, with the exception of the seventh paragraph of page 6 ("Appellant had had conversations…").

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2018) 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). 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). 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, including the context in which it is said, and the general work environment." *Meyers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). 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).

First of all, this case is distinguished from *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 – not an employee. 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 co-workers, a friend, to complain about Brankovic. She again called Brankovic a "bitch." This conversation, however, took place before work hours. In *Nolan* the "relevant factor" that dictated the outcome of the case was that there was no instance of a disrespectful comment made to a co-worker while at work. The Nolan Court did not authorize workers to make such comments under any circumstance but rather "merely h[e]ld that the facts of this case do not support a finding of willful misconduct…" *Nolan* slip op. at 15. On its way to this ruling the Court explained "[w]hether the use of improper language rises to the level of misconduct depends on —the context in which it is said and the general work environment." Slip op. at 12. In other words, Nolan falls within the old rule that 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…[and] whether the event is misconduct is most generally a decision for the agency." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

As noted by the Administrative Law Judge, this case involves primarily five alleged incidents of disrespectful language from the Claimant. Of these we concur with the Administrative Law Judge in finding no fault in the Claimant for her conversation about her daughter and her ex-husband. These perhaps did not display the best judgment, but for our purposes we disregard them in our analysis for the reasons set out by the Administrative Law Judge.

Of the remaining three, the least concerning are the references to Hitler and the Gestapo. These have the aggravating factor of having been said directly to a manager in reaction to the imposition of a new policy. They are somewhat more than everyday griping about work. Yet they are not severe comments. Such references to the Nazism have been normalized in our culture to a large extent. Although such comments do remain disrespectful, they are no longer as offensive as they would have been in the past. *See e.g. Morgan v. NYP Holdings, Inc.,* 2017 NY Slip Op 51907 (Supreme Court, King's County 12-15-17) ("comparing plaintiff to a Nazi constitutes hyperbole and a non-actionable opinion as a matter of law"); *Meriam-Webster Dictionary*, online edition, https://www.merriam-webster.com/dictionary/Nazi (alternate definition of "nazi" is "a harshly domineering, dictatorial, or intolerant person"); *Dictionary.com*, "nazi" ("Sometimes Offensive, a person who is fanatically dedicated to or seeks to regulate a specified activity, practice, etc.:"). We gauge them as moderately objectionable. We do think any reasonable person would understand that such remarks would be contrary to the Employer's policies. Given the context, we consider them to be more than just poor judgment, although we would not disqualify on these comments alone. They nevertheless receive appropriate weight, although minor, in our calculation of whether the conduct of the Claimant was serious enough to be misconduct.

The more serious incidents in our view are those of August 15 and September 12. The August incident took place during a lull in the training while a call was being set up. So it was at work, during work time, during a lull in the training, and with a trainee. The Claimant then launched into a prolonged

story in which she complains about the director, and attempts to cast her in a bad light. She shows a disrespect for management in a way that tends to undermine the authority of IWD management. Further, this is not a slip of the tongue, or an isolated snide remark. There was no legitimate purpose to the story, such as an attempt at concerted action. The standards that any Employer has a right to expect from its workers include that its trainers will not *during training* model disrespect for management. This expectation includes a lull in the actual presentation. A break from training is not the same as a break from compensated work time, and so this case is not like *Nolan* in that regard. We no more would expect a trainer to engage in such conduct while waiting for the phone connection, or while on a break from the presentation, than we would expect an Administrative Law Judge to regal parties

with complaints about the Administrative Hearings Division while on a restroom break from the hearing. The formal role of the trainer continues even while on an incidental break from the proceedings. The Claimant was in the role of trainer throughout, she was expected to act appropriately to that role, and she willfully disregarded that expectation. Similarly the September 12 incident took place while in a training session and with a trainee. Again the participants maintained these roles during the Claimant's invective, again this was a prolonged
complaint not merely one snide comment, and again the comments were of the sort that would tend to undermine management authority when spoken in this context. The Claimant even expressed during her remarks that she was aware she was being inappropriate. The September 12 incident too showed a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees in the role of trainer.

Taken together we find the Hitler/Gestapo references, the incident of August 15, and the incident of September 12 constitute disqualifying misconduct. We would find misconduct even without considering the Hitler/Gestapo references.

DECISION:

The administrative law judge's decision dated February 5, 2018 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, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

The Claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. The argument was substantially corroborative of evidence already presented before the administrative law judge. While the argument was considered, the Employment Appeal Board finds it is insufficient to cause a reversal of the Board's previous decision.

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Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

AMG/fnv