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

GINNY R MITCHELL	:	
	:	**HEARING NUMBER:** 11B-UI-01746
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
AFFINITY CREDIT UNION	:	
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 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:

Ginny Mitchell (Claimant) worked for Affinity Credit Union (Employer) as a full-time loan officer from March 23, 2003 until she was fired on January 13, 2011. (Tran at p. 2-3; p. 20). The Claimant had previously worked for the Employer from 1997 to 2001. (Tran at p. 9; p. 13).

On December 23, 2010 the Claimant responded to an email reminder about cell phone use with an email to her supervisor saying "Whatever! I was on break!" (Tran at p. 3; p. 9; p. 13-14; Ex. 1). The supervisor then sent an email explaining that she should have then used her cell phone in the break room. (Ex. 1). The Claimant then responded with a long email stating with "OK I will." (Tran at p. 8; Ex. 1). In the first paragraph the Claimant sets out her familial issues that she was handling on her three cell calls. (Tran at p. 22; Ex. 1). She then said that maybe next time she should just take the day off and take care of family

rather than try to get work done. (Tran at p. 28; Ex. 1). In the next paragraph the Claimant complained generally about her hard work and long hours. (Tran at p. 21; Ex. 1). She was feeling overwhelmed. (Tran at p. 21; p. 22). She then admonished that just because someone was in her office talking, it does not follow that she is not working. (Ex. 1). The email then said that, "You know when you assume something you tend to make an ass out of yourself." (Tran at p. 3-4; p. 12; Ex. 1). The email was not sent to any other person other than claimant's supervisor. (Tran at p. 8; p. 14-15; Ex. 1). The Claimant knew her supervisor well and was used to talking with her in an informal manner. (Tran at p. 21; p. 23). The Claimant had no formal warnings on her record. (Tran at p. 4; p. 17; p. 27-28). The Employer has progressive discipline, but allows that severe conduct such as insubordination may result in skipping the progressive discipline. (Ex. C).

The Claimant was terminated solely over the contents of her email sent on December 23. (Tran at p. 3-4; p. 11; Ex. 1; Ex. A).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2011) 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). "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.

Looking to the factors we see only one that is clearly implicated. The email went only to the supervisor so it was not in front of any third parties. There were no threats of violence or to misbehave in the future. The vulgarity was not repeated, and there was no discriminatory content. We are unsure of the *overall* environment, that is, whether mild vulgarity such as "ass" was tolerated, yet the evidence shows that the Claimant was accustomed to such language with her supervisor. This leaves us with factor two, undermining a supervisor's authority. Yet the Claimant is not refusing the directive. Rather she is a hard-working employee who feels that she is being nick-picked and is not appreciated. (Tran at p. 29). When she used the word "ass" she was obviously referring to the well-worn witticism based on the appearance of the letters "ass" at the start of the word "assume." (Tran at p. 23-24). While vulgar it is rather mild vulgarity. We recognize that we have, in addition to the vulgarity, the overall cheeky tone of the Claimant's emails. Had the Claimant had a history of such sassy communications with her

supervisor we

might have a different case. But the record shows only this one instance. The record shows that the Claimant was a good employee with no prior discipline on her record. Her email showed poor judgment but only in an isolated instance. "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd*. 616 N.W.2d 661, 665 (Iowa 2000). We find that misconduct, in the guise of insubordination, improper language or otherwise has not been proven.

DECISION:

The administrative law judge's decision dated March 24, 2011 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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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE 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

RRA/fnv