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

ENRIQUE R MUNOZ Claimant and **JELD-WEN INC** Employer	**HEARING NUMBER:** 19BUI-04239 **EMPLOYMENT APPEAL BOARD DECISION**

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: Enrique Munoz (Claimant) worked for Jeld-Wen Inc. (Employer) as a full-time technician worker from October 1, 2018 until he was fired on October 18, 2018. The Claimant received the Employer's handbook at the time of hire. The Employer's policies prohibit sexual harassment.

On October 11, 2018, the Claimant and male co-worker Jerry approached their female co-worker K. Male co-worker R was also nearby. Claimant sat down beside co-worker K. K did not know the Claimant and had not seen him before. The Claimant asked K if he could get a phone out. K was noncommittal. The Claimant then showed a cell phone to K saying "look at this." A pornographic video was playing on the cell phone. We find that the Claimant knew that the phone was displaying this offensive material when he displayed it to K. Both K and R saw the video. About an hour later Claimant and Jerry returned. As Jerry approached the Claimant, he claimed that Claimant had shown Jerry another video and they thought K was in the video.

On October 16, 2019, K and R reported to management seeing the pornographic material on the phone on October 11, 2018. They reported that it was the phone that the Claimant had handed to the K. As a result the Claimant was suspended on October 16, 2018 and fired on October 18.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2019) 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).

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 Employer's evidence that the Claimant was guilty of showing a co-worker pornographic videos on a cell phone. We do not credit the Claimant's denials. We note that the witness statement containing what the Claimant said to the Employer is not hearsay. What the Claimant said can be considered for any material purpose since a party's own statement, by definition, is not hearsay. I. R. Evid. 5.801. The statements of K and R are hearsay. As far as the nature of this hearsay, in general terms, the Employer's witness was a continuous improvement manager. It is, of course, extremely common that an employer presents its evidence of alleged misconduct through its human resource and/or management staff. Appearing at such hearings is a routine job requirement for such persons, and thus it is routine to find them presenting the employer's evidence at hearing even though they were not personally involved in the events leading to the job separation. This being such a common business practice is relevant to whether a reasonably prudent employer is "accustomed to relying" on such hearsay in conducting serious affairs. *See Ames Comm. School Dist. v. Cullinan*, 745 N.W.2d 487, 494 (2008)(teacher termination case citing as indicia of reliability "administrative reports and memoranda, while hearsay, had been drafted as part of the school administrators' official responsibilities"). The results of an investigation by human resource staff is used by employers on a daily basis to make important employment decisions. *See Cataldo v. Employment Appeal Board,* 1999 WL 956509 (Iowa App. 1999); *Ames Comm. School Dist. v. Cullinan*, 745 N.W.2d 487, 494 (2008). This is exactly the sort of evidence that reasonably prudent people are accustomed to rely on in conducting serious affairs. We also have two sources of information supporting that the Claimant had shown the video. Both contradict Claimant's testimony. This also adds to the reliability of the hearsay. *Grover v. Employment Appeal Board*, No. 06-2081 (Iowa App. 6/27/2007).

We recognize that the Claimant says he was the victim of Jerry who duped him into handing the phone to K, and who again got him to come along an hour later when Jerry unbeknownst to Claimant again planned to harass K. We don't find this credible. It is implausible on its face. As soon as a co-worker hands you a phone and asks you to show something to a woman you don't know, most men of any prudence would become immediately suspicious. The fact that Claimant testified that he knew first-hand that Jerry was a shady character, and had witnessed him doing sketchy things, reinforces the idea that normally you would not be so gullible when he handed you his phone to give a strange woman. Then if you saw the porn playing, to again return with the co-worker to the area of the same woman would show a marked level of foolishness. The deportment of the Claimant at hearing was not of a fool. He gave the impression of a competent and strong-willed person who is not so easily hoodwinked. Further, at hearing the Claimant reported that he was on his phone and handed Jerry's phone over to K without ever seeking what was on it. In his statement to the Employer he stated that he was looking through his phone when a video came up and K saw it, and he told her to ignore it.

These are inconsistent statements. In one it is Jerry's phone and the Claimant hands it to K, and in the other it is his phone in his hand. Also in one the Claimant is unaware of the video, and in the other he sees it but tells K not to watch. This change in story also undermines the credibility of the Claimant.

We note that the Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The majority concur in our determination of finding the Employer's evidence more credible given the factors we identified above.

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, or offensive behavior 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). The consideration of these factors can take into account the general work environment and other factors as well.

To be clear we do not disqualify the Claimant for what Jerry said when they returned. Nor do we infer that the Claimant actually showed Jerry another video. We disqualify for the action of handing the cell phone to K, and telling her to "look at this." We do not find credible that the Claimant was unaware of the type of video she would see.

Here the Claimant's intentional actions were highly demeaning toward a co-worker and sexual in nature. Having reached this conclusion we have little trouble finding that he should thus be disqualified for misconduct.

Finally, we note for the edification of the parties, that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4)(emphasis added). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. *See also* Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review

under chapter 17A…).

DECISION:

The administrative law judge's decision dated June 20, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he 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 has addressed the issue of overpayment in a separate decision issued today.

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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