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

RUSSELL R KEPHART	:	
	:	HEARING NUMBER: 10B-UI-16479
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
STAFF MOTEL 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: 96.5-2A

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:

Russell Kephart (Claimant) worked for Staff Motel LLC (Employer) as a part-time bartender from March 12, 2007 until the date of his discharged on December 12, 2008. (Tran1 at p. 2; p. 9). The Employer disciplined the Claimant repeatedly for refusal to follow instructions of the Employer, and for inability to get along with others. (Tran1 at p. 3; p. 11; Tran2 at p. 5; p. 6; Original Exhibit 1). In November 2008 the Employer suspended the Claimant for three days. (Tran1 at p. 3).

On December 12, 2008 the Claimant bad mouthed the owner to customers (including calling her a bitch), but, unbeknownst to him, the owner overheard him. (Tran2 at p. 1; p. 5; p. 11; Ex. 1). The owner then confronted the Claimant, gave him a partial check, and sent him home. (Tran2 at p. 1-2; p.

5; p. 7-8; p.

11; Ex. 1; Ex. 2). At that time the Employer decided the Claimant would no longer perform services for the Employer because of his insubordination. (Tran1 at p. 6; p. 7; p. 9; Tran2 at p. 1-3). This was the Claimant's last day of work. (Tran1 at p. 6; p. 9-10;Tran2 at p. 3-4; p. 5; p. 9). He was separated from employment on that day. (Tran1 at p. 6; Tran2 at p. 1; p. 3-4; p. 5; p. 9; p. 11).

On January 18, 2009 the Claimant came into the Employer as a customer. (Tran1 at p. 6). When doing so he caused a commotion by criticizing the bartender on duty about how she handled transactions with him. (Tran1 at p. 7; Original Ex. 1, p. 16). This lasted for 45 minutes. (Tran1 at p. 7).

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:
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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).

More specifically, continued failure to follow reasonable instructions constitutes misconduct. *See Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *See Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." *Myers v. IDJS*, 373 N.W.2d 507, 510 (Iowa 1983)(*quoting Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review*, 19 Cmwlth. 475, 338 A.2d 794, 796 (1975)); *Pierce v. IDJS*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988).

An employer has the right to expect decency and civility from its employees. The use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990), *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).

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 testimony that the Claimant was in fact terminated on December 12 for insubordination, and disrespect of the owner. Here the Claimant's behavior is greatly exacerbated by his long history of refusal to follow directions, his use of profanity about a supervisor, and his decision to speak this way to *customers of the Employer.* Clearly, this can do nothing but impair the Employer's ability to manage the Claimant and to run its business. This is misconduct without a doubt. The Claimant should thus be disqualified.

Even if we were inclined to agree with the Administrative Law Judge's decision that the Claimant was merely suspended on December 12, still we would deny benefits. Where an employee commits acts that impair the employee's ability to function on the job this can be misconduct even if the acts do not occur at work or during work hours. *See Cook v. IDJS*, 299 N.W.2d 698, 702 (Iowa 1980). Here the Claimant is a bartender, who serves the public. He was, if we apply the Administrative Law Judge's reasoning, on suspension for obnoxious and disrespectful behavior that easily constitutes misconduct. He comes into his place of employment, now as a customer. And he continues the same sort of behavior in front of *customers of the Employer*, that got him suspended in the first place. He was at the Employer. The people around him were, by definition, customers of the Employer and the Claimant knew it. He then does exactly the same sort of thing that put him on suspension. We cannot see how this is anything but work-connected misconduct, even if he was still an employee past December 12. In short, December 12 or January 18 the Claimant was fired for work-connected misconduct and is disqualified from benefits.

DECISION:

The administrative law judge's decision dated December 14, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time as 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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Elizabeth L. Seiser

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Monique F. Kuester

RRA/ss

DISSENTING OPINION OF JOHN PENO:

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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John A. Peno

RRA/ss