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

JOSHUA LOVERIDGE	:	
	:	**HEARING NUMBER:** 11B-UI-04577
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
HY-VEE INC	:	
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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Joshua Loveridge, worked for Hy-Vee, Inc. from August 28, 2003 through March 2, 2011 as a part-time kitchen clerk. (Tr. 2-3, 7) On March 2nd, 2011, while working beside a table of customers (Tr. 5), the Claimant asked Donna Simpson (his immediate supervisor) (Tr. 8) how he was doing. She acted "snottily" and retorted, "you know…" (Tr. 4, 6, 8, 9) Upset by her response, he stormed off referring to her as a "f-cking b-tch!" in the presence of co-workers and customers. (Tr. 4, 6, 8-9, 10, 11)

The Employer has a policy that prohibits "…verbal abuse or profanity…violations...[and the use of which] will result… [in] disciplinary action up to an including termination…" (Tr. 4-5) The Claimant received a copy of the Employer's policies and signed an acknowledgement of receipt on March 14, 2006; and upon its update, the Claimant signed again on February 16, 2010. (Tr. 6) Mr. Loveridge

never received any prior disciplines for any infraction. (Tr. 5, 10)

Although the Claimant offered to apologize to Ms. Simpson, the Employer told him "…it was probably too late for that…" (Tr. 5, 8, 10) The Employer terminated him that same day.

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:
>
> 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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).

Both parties agree that the Claimant called his supervisor a 'f-cking b-tch' to her face and in the presence of her customers. (Tr. 4, 6, 8-9, 10, 11) Although the Claimant felt instant remorse, he admitted he was having a bad day. This sentiment, unfortunately, comes too little, too late, as his Employer also opined. (Tr. 5, 8, 10) Not only was Mr. Loveridge's behavior insubordinate, he violated a known company policy. The court in Deever v. Hawkeye Window Cleaning, Inc., 447 N.W.2d 418 (Iowa

App. 1989) held that vulgar language, which would serve to undermine the Employer's authority, is disqualifying misconduct

even though it was an isolated incident. See also, Zeches V. Iowa Department of Job Service, 333 N.W.2d 735 (Iowa App. 1983) wherein the court held that when an employee has been warned about 'watching his mouth' and he curses the front office the next day in front of customers, misconduct is established. Although the record contains no such prior warnings, the Claimant's behavior is nonetheless inappropriate and would certainly undermine fellow employees and customer relations, alike, if such behavior were to persist and go unpunished. (Tr. 7)

The Claimant, in this instance, knew that his behavior was against the Employer's policy and interests, yet he displayed such a blatant disrespect for his supervisor in the presence of customers that we can only conclude it was misconduct within its legal definition. The fact he received no prior warnings does not detract from the egregious behavior he displayed which any reasonable person would know was unacceptable. "In order to be disqualified from benefits for a single incident of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the Employer has a right to expect of employees." Diggs v. Employment Appeal Board, 478 N.W.2d 432, 434 Iowa App. 1991) (citing Henry, 391 N.W.2d at 736). Based on this record, this Board would conclude that the employer satisfied its burden of proof.

DECISION:

The administrative law judge's decision dated May 4, 2011 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, the Claimant 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".

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Monique F. Kuester

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Elizabeth L. Seiser

DISSENTING OPINION OF JOHN A. 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

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative, the Claimant falls under the double affirmance rule:

> 871 Rule of two affirmances. IAC 23.43(3)
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus, the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/kk