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

DAVID A DETRICK Claimant, and WINEGARD COMPANY Employer.	:	HEARING NUMBER: 08B-UI-08935 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 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:

David Detrick (Claimant) worked for Winegard Company (Employer) as a full-time heavy press operator from the spring of 2004 until the date of his discharge on September 5, 2008. (Tran at p. 2-3; p. 4-5). On September 4, 2008 the Claimant became angry with a co-worker over the fact that a hose the Claimant was using had been painted the wrong color. (Tran at p. 3; p. 4; p. 6). The Claimant yelled at the co-worker about it because it posed a safety risk. (Tran at p. 3; p. 6). The co-worker was also yelling at the Claimant. (Tran at p. 7). When the incident started the Claimant was about 15 feet away and large machinery was running. (Tran at p. 5-6; p. 7). The co-worker stepped closer to the Claimant and they closed to about a yard apart. (Tran at p. 6). The Employer has failed to prove that the Claimant

threatened the co-worker. (Tran at p. 8). The co-worker reported that the Claimant had threatened him. (Tran at p. 3; p. 4). The Claimant was not asked for his side of the story. (Tran at p. 6). Instead the Employer terminated the Claimant for the stated reason that he had threatened the co-worker. (Tran at p. 3). The Claimant had been previously warned, prior to his 16-month service in Iraq, for allegations of threatening a co-worker. (Tran at p. 3; p. 5).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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).

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). But even then, 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).

In support of its case the Employer presented no first-hand testimony that the Claimant actually threatened anyone. There is not even an allegation that the Claimant admitted to anyone that he had made a threat. (Tran at p. 4). We are left with hearsay from the Employer. We do not automatically find that hearsay will be outweighed by live testimony. Walthart v. Board of Directors of Edgewood-Colesburg Community School, 694 N.W.2d 740, 744-45 (Iowa 2005); Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Yet the fact that the Employer chose to rely entirely on hearsay is a significant factor we must take into consideration when determining if the burden of proof has been carried. What can we say, but that we found the Claimant's testimony consistent and credible, certainly more so than hearsay. The Employer having failed to prove that a threat was made we are only left with the Claimant "yelling." Yelling back-and-forth with a coworker from a distance of 3-4 feet, with loud machinery running, and concerning a safety issue is nothing more than an isolated error of judgment. Such isolated errors are not misconduct. It was, as the Claimant admits, "something stupid on my part" but on this record it did not rise to the level of misconduct. Even taking into account the prior discipline under these circumstances we cannot find the Employer has proven misconduct.

DECISION:

The administrative law judge's decision dated October 21, 2008 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

RRA/fnv

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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