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

LEJLA SULJEVIC Claimant, and BEEF PRODUCTS INC Employer.	:	HEARING NUMBER: 08B-UI-05795 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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant Lejla Suljevic, worked for Beef Products, Inc. from December 2004 through May 22, 2008 as a full-time quality assurance inspector. (Tr. 4-5, 8-9) On May 22, 2008, the claimant worked overtime performing shipping duties that needed to be completed by 10:00 p.m. (Tr. 9-10) The employer asked her to retrieve some supplies from the warehouse. (Tr. 5, 9) Ms. Suljevic questioned why she had to go when there were "…four or five QA's standing there…" (Tr. 9, 11) She also commented that it wasn't her 'f-cking' job (Tr. 5, 9), but went on to obtain the 'buffer seven' as requested. (Tr. 9, 12)

The 'f-word' is frequently used in this workplace. (Tr. 10-11, 16) On one occasion, Rick (plant manager) called the claimant 'f-cking stupid' to which she complained to the corporate office, but nothing

was done about it. (Tr. 12, 14) That same day, the employer terminated the claimant for "… use of abusive language and her insubordination to her supervisor…" (Tr. 15)

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.

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).

The claimant was discharged, in part, for use of abusive language (Tr. 15) in a workplace where the 'f-word' is prevalently used. The employer did not refute its commonplace usage. (Tr. 12) In fact, the claimant's own supervisor previously directed the 'f-word' at her with no repercussions after she complained. (Tr. 12, 14) The employer offered no other evidence of prior warnings issued to Ms.

Suljevic for this type of behavior or any other infraction other than the May 22nd incident. According to her testimony, she believed she was terminated because she previously filed a complaint against the plant manager, which is not an unreasonable inference. (Tr. 12, 14)

As for the allegation of insubordination, the employer maintains that Ms. Suljevic refused the employer's directive. See, Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) wherein the court held that continued failure to follow reasonable instructions constitutes misconduct. In this case, however, the claimant did not have a history of such behavior; nor did she refuse this one directive. On the contrary, she complied with the employer's directive albeit after heartily voicing her complaint. While we do not condone her 'tone' or use of vulgar language, at worst, this was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct

Lastly, the employer failed to provide any firsthand witnesses to the incident. (Tr. 8) According to Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976), where, without satisfactory explanation, relevant evidence within control of party whose interests would naturally call for its production is not produced, it may be inferred that evidence would be unfavorable. For this reason, we attribute more weight to the claimant's version of events, which we find credible. Based on the foregoing, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated July 11, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/ss

DISSENTING OPINION OF MONIQUE F. 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

AMG/ss