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

SHANNA M WADE	:	
	:	**HEARING NUMBER:** 16B-UI-00025
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
CASEY'S MARKETING COMPANY	:	
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: 96.5-2-A, 96.3-7

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:

Shanna Wade (Claimant) worked for Casey's marketing Company (Employer) as a part-time cook from August 12, 2014 until she was fired on December 6, 2015. On September 10, 2015 the Claimant was warned for the stated reason of poor customer service, and receiving customer complaints. On December 3, 2015 the Claimant was given a written warning for the stated reason of bickering with co-workers.

On December 6, 2015 the Claimant told her co-worker that the previous shift was not stocking the necessary ingredients. The co-worker denied the Claimant's assertions. The Claimant continued to complain about how busy things were, and how she would not be able to keep up with the work. She also disagreed about the kitchen being properly stocked. The co-worker called the store manager and complained about the Claimant. The Claimant thought the co-worker was calling for more help, and thought the issue of more help was resolved. She made no more complaints. When the store manager arrived the Claimant told the store manager about how busy things were and about how they needed help.

The Claimant was then fired.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) 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).

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). Use of foul language can

alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). 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).

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 Claimant's description of her behavior on her final day. In particular, that the Claimant was overwhelmed, needed help, had only disagreed with Stogdill over the amount of work and the stocking issue, and that this took only a few minutes. We also find that the Employer, with a single reference to "cussing" from a witness who was not present, has failed to prove with credible reliable evidence that the Claimant cursed on her final shift.

The Employer has not proven yelling or threats or cursing or discriminatory conduct or a refusal to do the assigned job tasks. The Employer does not submit proof that the Claimant was overheard by customers on her final day. She was not arguing with a manager or refusing to do her job, that is, she was not undermining a manager's authority. The Claimant said, at the worst, that she would leave when her shift was over, but this is little more than venting until the time comes that she does leave. Even if we found she said this, and it is *not* proven, we would not find that to be even a threat to violate an employer directive in the future. This is because there is no showing that the Claimant, for some reason, was not allowed to leave at the end of her shift. What we do have is complaints of unfair treatment, including a failure to stock, and little else. In some extraordinary job environments this might be misconduct, but nothing like that is shown. This was in the kitchen of a convenience store and the tone of the Claimant's voice has not been shown to be so unusual in that general work environment so as to constitute misconduct. As we mentioned, the Employer did not prove that the exchange was heard by customers. Nor do we think that a discussion of workflow and stock levels is something that would alarm or concern customers if overheard. We are left only with a rather ordinary workplace dispute, with a demanding employee. Challenging conditions as unfair, without some significant aggravating factor, is not misconduct – even if the challenge is wrong.

This case is not about choosing sides on the issue of previous stocking. The Claimant is not to be denied benefits just because she may have been wrong about the stocking. She was fired for arguing, not being wrong. And it takes two to disagree. The Claimant made an assertion, and Stogdill disagreed. We cannot find that it was misconduct for the Claimant not to shut up immediately. To be specific, the Employer cannot convert every disagreement with co-workers into misconduct just by giving a warning not to "argue." We take into account that the Claimant was concerned with not being able to keep up with the customers, and that her complaints were aimed in part at getting more help. Indeed, she fell silent once she thought help was on the way. Also lessening culpability was that things were indeed very busy, and the Claimant was flustered – something that is not ordinarily considered to be intentional. Even granting that the Claimant was persistent and adamant that final day and taking into account her prior warnings, the Employer has not shown the Claimant in this matter is guilty of conduct that rises to the level of a **willful and wanton** disregard of the Employer's interests. 871 IAC 24.32(1)(a). We note, as we have often done, that conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552, 554 (Iowa App. 1986); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983); *Newman v. Iowa Dept. of Job Service*, 351 N.W.2d 806, 808 (Iowa App. 1984). This case falls into that category and we accordingly allow benefits today.

DECISION:

The administrative law judge's decision dated January 26, 2016 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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Ashley R. Koopmans

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James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

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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Kim D. Schmett

RRA/fnv