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

JANET R DRAKE	:	
	:	
Claimant,	:	**HEARING NUMBER:** 15B-UI-00966
	:	
and	:	
	:	**EMPLOYMENT APPEAL BOARD**
KINSETH HOTEL CORPORATION	:	**DECISION**
	:	
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

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 Employment Appeal Board would adopt and incorporates as its own the administrative law judge's Findings of Fact with the following modifications:

The Employer has a hospitality policy that prohibits employees from using "…[profanity] or abusive language towards fellow employees, customers, or others…' in the workplace. (11:25-11:45) The Employer received numerous complaints about the Claimant using profanity when talking to herself. (39:13-39:25)

The Employer issued a written warning to Ms. Drake regarding her use of profanity towards a lead worker on Monday, August 5, 2013 after the Claimant was redirected to mop a floor that hadn't been cleaned completely. (15:42-17:59)

After the December 30th incident, the Employer suspended Ms. Drake and sent her employment file, which contained all her previous write-ups, coachings and counselings, to the corporate office for review. (21:58-22:40) The Corporate office decided to terminate Ms. Drake. The Employer notified the Claimant that she needed to meet with the Employer on January 8th, but she was unable to meet at that time. (24:30-24:46) She finally met with the Employer on January 13th, at which time the Employer terminated her for violation of the profanity rule. (25:33-25:42)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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 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 attribute more weight to the Employer's version of events. The Employer issued warnings to the Claimant on at least three occasions regarding policy violations. Two of those warnings involved violations of the policy prohibiting the use of profanity in the workplace, particularly as against fellow employees. Her September 24, 2014 written warning also included a caveat that further infractions would result in her termination.

The Employer provided credible testimony that the Claimant routinely used profanity while working based on complaints from other employees. This assertion is corroborated by the Claimant's own testimony when she, essentially, argued that everyone does it. When asked specifically if she used the f-word on that last incident, the Claimant provided equivocal testimony, initially, denying use of the word; then stating, "I don't recall using it." (54:57-55:49) She also attempted to mitigate the possibility that she used the word by rationalizing that everyone was frustrated, and everyone would cuss from time to time. (45:55-46:15; 46:32-46:54) The Claimant did not deny that she had knowledge of this policy against profanity and admitted she knew the Employer was watching her. The fact that she muttered her comments under her breath, and didn't intend for anyone to hear her does not absolve her from culpability. Not only was her profane comment heard by the co-worker, her comments could have potentially been overheard by a customer. Either scenario goes against the Employer's interests, as the Employer has a right to expect a certain level of civility and professionalism amongst its employees. That's part of the reason why such a policy exists.

Ms. Drake also understood that her job was in jeopardy when she was sent home because the Employer told her 'it didn't look good' in light of her previous warning for the same type of violation. (32:18-33:05; 57:00; 58:06-58:10) Based on this record, as a whole, we find it more probable than not that Ms. Drake, once again, violated the Employer's policy prohibiting the use of profanity, which demonstrated an intentional and substantial disregard of the duties and obligations she owed to the Employer. For the foregoing reasons, we conclude that the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated February 24, 2015 is **REVERSED**. The Claimant was discharged for disqualifying reasons. Accordingly, the Claimant is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Kim D. Schmett

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Ashley R. Koopmans

DISSENTING OPINION OF JAMES M. STROHMAN:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the administrative law judge's decision in its entirety.

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James M. Strohman

AMG/fnv