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

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| **RYAN T HALE** | : | |
| | : | **HEARING NUMBER:** 11B-UI-17352 |
| Claimant, | : | |
| | : | |
| and | : | **EMPLOYMENT APPEAL BOARD DECISION** |
| **SM HENTGES & SONS 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:** 96.5-2-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:**

Ryan Hale (Claimant) was employed by S.M. Hentges & Son (Employer) as a full-time pipe layer from June 30, 2010 until he was fired on November 22, 2010. (Tran at p. 2; p. 4; p. 10; p. 24). The owner of the Employer is Steve Hentges. (Tran at p. 6; p. 7). Merle Euerle is a foreman. (Tran at p. 1).

On November 22, 2010, Mr. Hentges told the claimant to go and clean the tracks on some equipment. (Tran at p. 6; p. 11). The Claimant did go and clean the tracks. (Tran at p. 10-11; p. 12; p. 21; p. 22). When Mr. Hentges came to review the work the Claimant got into a spirited exchange with him. (Tran at p. 23). Mr. Hentges called the Claimant a “dumb fucker” at some point. (Tran at p. 23). The Claimant was fired over his exchange with Mr. Hentges. (Tran at p. 7). The Employer has failed to prove by a greater weight of the evidence that the Claimant cursed Mr. Hentges, told him to clean the tracks himself, or made any similar remark to Mr. Hentges.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2011) 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). 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

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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).

Here we do not reach the question of whether the alleged single instance of cursing rises to the level of misconduct. This is because we cannot find that the alleged cursing took place.

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 have found credible the Claimant's testimony denying that he cursed the owner of the company. We understand that Mr. Eurle directly contradicts the Claimant. While we find the Claimant somewhat more credible, even if we were to find the witnesses equally credible we would rule the same way. When the evidence is in equipoise the party with the burden, here the Employer, loses. We note that had Mr. Hentges testified the outcome might have been different. As it is, we find the Employer has failed to prove that the Claimant did that which he is accused of, and we find misconduct has not been proven.

**DECISION:**

The administrative law judge's decision dated February 8, 2011 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

**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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RRA/fnv Monique F. Kuester