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

REGINA A SIECK	:	
	:	**HEARING NUMBER:** 20BUI-10040
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
CSOI CORP	:	
	:	
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: 96.5-2A

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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Regina Sieck (Claimant) worked for CSOI Corporation (Employer), most recently as a full-time clerk, from August 2005 until she was fired on October 14, 2019. The Employer is a liquor store.

On August 5, 2019, the Employer gave the Claimant a written warning after customers complained that the Claimant spoke to employees and a manager in a derogatory and abusive manner in front of the customers.

On approximately October 7, 2019, three customers complained to district supervisor Steve Sparling that the Claimant referred to the customers who are Native American as “you people” and refused to accept coins as payment from a customer on one occasion. On October 14, 2019, Sparling confronted the Claimant about the allegations. The Claimant admitted referring to the customers who are Native American as “you people.” Claimant admitted that she refused the change as payment and claimed it was extremely dirty. The Claimant was terminated based on her poor treatment of customers. At hearing the Claimant denied referring to Native Americans as “you people,” and denied

admitting this to Sparling. We do not find these denials credible. The Employer has proven by a greater weight of the evidence that the Claimant did refer to Native American customers as “you people,” and refused to take money from them she deemed “dirty.”

REASONING AND CONCLUSIONS OF LAW:

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

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 evidence from the Employer that the Claimant made the remark "you people" repeatedly to Native American customers. We recognize that some of the evidence is hearsay. We do find it is the sort of evidence that reasonably prudent persons are accustomed to relying on for the conduct of their serious affairs. One factor favoring the consideration of the hearsay is that the information is from customers. Customers, of course, are not automatically reliable, but the fact that the information comes from persons outside the Employer's employ helps explains why the employer would not call the persons as witnesses. *See Cataldo v. Employment Appeal Board*, 1999 WL 956509 at *4 (Iowa App. 1999). Further, there were multiple persons making the same complaint about the same phrase, and this tends to corroborate the hearsay as well. *See Grover v. Employment Appeal Board*, No. 06-2081 (Iowa App. 6/27/2007). Finally, the admission the Claimant made to the Employer during the internal investigation is not hearsay. What the Claimant said can be considered for any material purpose since a party's own statement, by definition, is not hearsay. I. R. Evid. 5.801. While the Claimant denies making this admission we believe the first-hand account of the admission given by the Employer's witness Sparling. The non-hearsay admission of the Claimant corroborates the Employer's hearsay evidence. On balance we find the Employer's evidence to be reliable enough to consider, and we further find it to be more credible than the Claimant's denials.

We note that each Board Member listens to the digital recording of this hearing, and since this was a telephone hearing, each Board Member has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The members concur in our determination of finding the Employer's evidence more credible given the factors we identified above.

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). 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). Aggravating factors for cases of bad language include: (1) using the language in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. IDJS*, 333 N.W.2d 735 (Iowa App. 1983). An offensive comment can be misconduct even where the target of the comments are not present. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). The consideration of these factors can take into account the general work environment and other factors as well.

Here we have several of the factors in play. First, there is discriminatory content. While the phrase "you people" is not the most vile racist remark that can be made, when used to single out people of a certain race it is nevertheless a disturbing racial remark. Second, the remark was complained because it was made repeatedly. Third, the remark was made to customers. Obviously, a retail store has a very strong interest in not alienating its customers with derogatory racial remarks. The preeminence of the not subjecting customers to such unwelcome remarks has been made clear by the Iowa Courts. In *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983)

the manager at a convenience store (Quik Trip) was frustrated with vendors. In discussing this he said, in the store, that the "stupid motherfuckers" needed to get their "head out of their ass." *Zeches* at 735. Notably this

remark was made in front of customers, but was not directed at customers. The Court affirmed the denial of benefits on the basis that the conduct was "in front of customers…." *Myers* at 737. Here the remark was made directly to the customers, and while it was not obscene, it was racially derogatory. The conduct the Claimant was warned for was similar to the disqualifying conduct detailed in *Zeches.* We find the Claimant's "you people" remarks, especially given her prior warning, raises to the level of misconduct. We reach this conclusion even completely disregarding the "dirty money" incident.

DECISION:

The administrative law judge's decision dated January 17, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

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Ashley R. Koopmans

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James M. Strohman

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Kim D. Schmett

RRA/fnv