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

JOHNNY S PATTERSON	:	
	:	**HEARING NUMBER:** 16B-UI-13472
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
GMRI 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. 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:

Johnny Patterson (Claimant) worked for GMRI, Inc. (Employer) as a part time server from October 7, 2014 until he was fired on November 2, 2015. The Employer is a restaurant known as Longhorn Steakhouse. Christopher Gaines is a managing partner of the Employer.

On November 2, 2015, Claimant and Mr. Gaines were in the office together discussing a workplace issue. Claimant did not agree with the coaching that Mr. Gaines was giving him. The Claimant's tone of voice became louder. The Claimant pointed at Mr. Gaines, but he was about a foot and a half away because the office in question is small and three people were in it at the time. The Claimant did not touch Mr. Gaines. The Employer has not proven that the Claimant made any threats, took any action that could place a reasonable person in fear of imminent harm, or used vulgarity. In particular, Employer has not proven that the Claimant got closer to Mr. Gaines and pointed his finger in Mr. Gaines' face. The Employer has not

proven that the exchange could be heard by customers. The Employer did not prove that the Claimant's raised voice was loud enough to be considered yelling. The only specific allegedly threatening statement proven was that the Claimant said "I'm not yelling, you would know when I am yelling" once Mr. Gaines remarked that the Claimant was yelling. The Claimant did not refuse to leave the office when ordered to, but only delayed as long as it took to make the reasonable request that he be given a copy of the discipline. In so making the request, the Claimant stated that he would leave, and there was no refusal of an order.

Mr. Gaines contacted employer relations with the company and they did an investigation. The company then terminated the Claimant over the November 2 incident.

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:
>
> 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 his interchange with Mr. Gaines. Our judgment on credibility is based in part on the fact that while Mr. Gaines claims to feel threatened, he cannot recall what the putative "threats" were. Against this the Claimant gives a detailed, consistent, and clear description of events including the exchange over the supposed threat.

Characterization of conduct as "aggressive" or "hostile" or "threatening" is exactly that, a characterization. It's the speaker's own conclusion. It is not a description of what the person did that the speaker believes to be aggressive or hostile or threatening. We disqualify claimants for what they did, not what others thought about what they did. We therefore need more than just the bare assertion that the Claimant here was "hostile." We need to focus on: what did he do that was perceived as hostile or aggressive or threatening?

Given our weighing of the evidence, the problem for the Employer, who has the burden of proof, is that its allegations of misconduct are so generic. The Employer alleges the Claimant made threats. If this were proven we would disqualify as a matter of course. But what the Claimant said that was threatening, even the gist of what he said, the Employer does not provide. The Claimant states that the perceived "threat" was saying "I'm not yelling, you would know if I were yelling." This is only someone describing that when they yell it is louder than the tone being presently used. This cannot be reasonably taken to be a threat. But if it were a threat, it would be a threat to "yell." Yelling is not always disqualifying, so much less is a threat to yell, and so much even less is an *implied* threat to yell at some unspecified time in the future. The Employer says the Claimant raised his voice, but does not submit proof that he could be heard by customers. Further, the Employer was not willing to characterize this as "yelling." We have no evidence of cursing or discriminatory conduct. We have a "louder" voice, pointing, and little else. In some extraordinary job environments this might be misconduct, but nothing like that is shown. This was the back of house in a restaurant, and a "louder" voice has not been shown to be so unusual in that general work environment so as to constitute misconduct. We also have no reliable evidence of threatening conduct. We are left only with a rather ordinary workplace dispute, with a demanding employee. Challenging action as unfair, without some significant aggravating factor, is not misconduct – even if the challenge is wrong. Even granting that the Claimant got louder, pointed his finger, and delayed leaving while he asked for a copy of discipline, the Employer has shown the Claimant in this matter is guilty of no more than "good faith errors in judgment" in an isolated instance. 871 IAC 24.32(1)(a). Benefits are allowed.

DECISION:

The administrative law judge's decision dated December 31, 2015 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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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv