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

SHAWN P RICKE	:	
	:	**HEARING NUMBER:** 11B-UI-02215DC
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
VAN DIEST SUPPLY CO	:	
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, 24.32-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. The matter has been remanded to the Board to consider the application of the principles of *Myers v. Employment Appeal Board*, 462 N.W.2d 734 (Iowa App. 1990) to the facts of this case. All members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds the administrative law judge's decision is correct. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATIONS**:

The Employment Appeal Board modifies the administrative law judge's decision by amending the findings of fact to read as follows:

> The claimant began employment on February 13, 2001, and last worked for the employer as a full-time team leader on January 22, 2010. The claimant received an employee handbook that contained the policies of the employer. The claimant knew that the employer's policy prohibited the use of profane or abusive language at the workplace.

Manager Hackbarth was claimant's immediate supervisor. On January 20, 2010, the claimant confronted Hackbarth in Building #17 by slamming his hard hat down and stating he had enough of this fucking place. He also stated he was tired of being fucking short on help every night, and tired of getting fucked over on his pay level increases. The claimant stated he was tired of all the bullshit, and he no longer wanted to be a Team Leader (White Hat).

Hackbarth submitted a written statement of the incident to Manufacturing Director Vold. Vold, and Operations Director Spencer met with the claimant on January 21 about the incident. Claimant admitted using profane language to Hackbarth. Claimant explained he was upset about the employer pressing him for increased production, and that his employer was expecting too much of him.

After reviewing the incident and claimant's conduct on January 20, the employer discharged the claimant on January 22, 2010 for the stated reason of abusive, profane and threatening language toward his supervisor. Although the Employer has a rule against profanity, it is common for employees to curse outside the earshot of managers.

The Employment Appeal Board modifies the administrative law judge's decision by amending the findings of fact to read as follows:

As an initial matter we apologize to the parties for citing the wrong case in our transmittal of testimony. We should have cited *Myers v. Employment Appeal Board*, 462 N.W.2d 734 (Iowa App. 1990) but instead cited *Myer v. IBP, Inc.*, 710 N.W.2d 213, 219 n. 1 (Iowa 2006). We made this error because the remand order cited both cases (properly) with *Meyer* (no "s") being cited for principles of administrative review and *Meyers* being cited on the unemployment issues. In its argument the Employer made the same error, no doubt because we did, but argued the factors from the *Meyers* (with an "s") case. Thus it is clear we all knew what we *meant* to be citing, and no harm is done. We, of course, look to *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990) to guide our analysis today.

Iowa Code Section 96.5(2)(a) (2009) 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).

Aggravating factors for cases of bad language include: (1) cursing 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 of vulgarity, 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. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983). We have no citation for discriminatory content, but

have no doubt that this is an

aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.

Basically what happened here was the Claimant was stressed by the high pressure of his team leader position. He decided to resign the team leader role, and in so doing vented his frustration in a profane outburst. Looking to the factors this does not rise to the level of misconduct in this particular case.

First, the Claimant was alone with his manager so no customer, vendor, or third party overheard. Second, while the Claimant was cursing in front of his manager he was not reacting to a directive from that manager. And since no other was present, the manager was not being disrespected in front of others. Moreover the thrust of the Claimant's complaints was over the pressure created in the job, rather than calling specific persons profane names. The Claimant, again, was venting over the job and any tendency to undermine management's authority was slight. Third, there were no threats of violence. The Claimant did slam his hard hat down, but not every forceful action is a threat. The hat was the symbol of the authority he was resigning, so his action was part of the resignation and not some sort of threat to hit anyone with the hat. We find there was no threat made, so this factor weighs against disqualification. Fourth, the Claimant did not state that he planned to disobey management in the future, or to make life difficult for management, or to take any similar action. Rather, the Claimant was resigning his team leader role precisely because he felt unable to continue *trying* to meet management expectations. Fifth, and this is a point the Employer hits, we must consider whether the profanity was repeated. We view this as a single outburst of profanity, and not a repeated instance as was seen in *Carpenter*, the case cited by *Myers*. In *Carpenter* the Claimant told his own supervisor to "kiss [my] ass." The Court explained that had Mr. Carpenter stopped at this point he might have an argument against disqualification. "However, petitioner, upon seeing and visiting with his crying wife, went to his wife's supervisor and said 'I am going to tell you the same thing I told Joe. You guys can all kiss my ass.'" *Carpenter* at 245. This was about thirty minutes later. *Id.* So in *Carpenter*, the case establishing the fifth factor, the employee cursed two separate supervisors thirty minutes apart. Our case has a single outburst to a single supervisor over a span of a few minutes. We do take into account that this single transaction contained multiple bad words. Yet this is not the same sort of repetition - two different supervisors cursed at two different times - that was seen in *Carpenter*. The sixth factor is not an issue as no one argues the Claimant said anything discriminatory.

Finally, the job environment is somewhat mixed. We find both parties credible on this point. The Employer doesn't like profanity and bans it, but it happens a lot anyway. It just happens out of the earshot of the managers. This factor weighs primarily on the intent issue. When an employer routinely allows cursing, its employees wouldn't know they could be disciplined for violating the unenforced policy against cursing. Here, however, the Claimant was aware that he shouldn't curse in front of management. But, since co-workers cursed as a matter of practice the Claimant was used to hearing such things, and slipped when he said them himself. Had he never heard such remarks we would be more inclined to find a calculated action, rather than an isolated emotional outburst. As it is, we find his actions were the product of high emotion more than a deliberate attempt to disrespect or insult. We do not mean to suggest that all profanity must be the product of deliberate decisions to be disqualifying, but only that such deliberation makes the

action more serious, and that a profanity-free environment makes an inference of deliberation more likely.

In the end, we have a worker trying to do a job who gets frustrated. When he is turning in his lead worker role, and the attendant hat, he vents his frustration and curses. This is an isolated act born of understandable emotion. Even taking into account the listed factors, we find the Employer has failed to prove a *deliberate* violation or disregard of standards of behavior which the employer has the right to expect of employees.

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John A. Peno

_____
Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge and deny benefits for the reasons set forth by the Employer.

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Monique F. Kuester

RRA/fnv