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

TANJLIA M KLINKER	:	
	:	HEARING NUMBER: 07B-UI-09597
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
PER MAR SECURITY & RESEARCH 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: 96.5-2-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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Tanjlia M. Klinker, worked for Per Mar Security & Research Corp. from December 7, 2000 through September 14, 2007 as a full-time courier. (Tr. 2-3, 7) The claimant typically took longer to complete her route compared with other company couriers. (Tr. 5) The employer verbally warned Ms. Klinker about taking so long to perform her job. On May 13, 2003, the employer issued a written warning to her for the time she spent in her company vehicle. (Tr. 5-6)

The claimant never received a personnel handbook about company 'rules and regulations' that outlined the break times, i.e., lunch, and two 15-minute breaks. (Tr. 9, 11) In an effort to monitor Ms. Klinker's driving time, the employer had another employee, Eddie Padilla, accompany her on her route. That time, she finished her route much quicker because Mr. Padilla "… [drove] considerably faster than [she] did." (Tr. 8) The employer did not disclose the reason for Mr. Padilla's accompaniment and Ms. Klinker believed he rode with her to familiarize himself with the route in the event she might become ill.

On September 11, 2007, the employer installed a GPS system on the claimant's company vehicle, tracking her from that date through September 13th, 2007. (Tr. 3) Through the GPS report, the employer believed that Ms. Klinker had taken extended breaks that totaled approximately two hours over the three days. (Tr. 4) When questioned as to why she took the additional time, Ms. Klinker responded, "… it's just the way she does her route, that she doesn't speed…" (Tr. 5) When the employer also presented her with specific information from the GPS report, the claimant pointed out that one of the alleged delays occurred while she was at the post office picking up packages, and that she also incorporated deliveries for the security coordinator into her route. (Tr. 8-9) Ms. Klinker was not aware that her job was in jeopardy. The employer subsequently discharged her for theft of company time. (Tr. 3-4)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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 claimant, a long-term employee, received minimal discipline for taking longer to complete her driving route than other couriers. Although the employer argued that numerous verbal warnings were issued to Ms. Klinker, only one written warning was issued four years earlier. However, even with that warning, the claimant was never put on notice that her job was in jeopardy. Additionally, Ms. Klinker never fully appreciated the employer's concern for her purported inefficiency based substantially on the employer's lack of discipline and communication to her about their concerns. When the employer directed Mr. Padilla to accompany her, there was no instruction that she should maintain certain protocol as established by his lead, or that he was monitoring her performance.

Ms. Klinker credibly testified that she worked to the best of her ability. Inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991); nor is poor work performance considered misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). When termination is based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984)

The claimant's purported theft of company time based on the information (the trip log that records dates, locations, starts and stops) is not, in and of itself, dispositive of misconduct. There is no evidenced in the record to establish that she acted intentionally to disregard the employer's interests. The employer concluded that on three days (September 11th through the 13th), the claimant took extended breaks that surpassed the break time normally allowed. Yet, she provided unrefuted testimony that the employer never issued her a personnel handbook containing company work rules on what were her job expectations. Additionally, the claimant credibly explained various reasons for the employer's perceived delay. (Tr. 9) At most, there were only a couple of hours in dispute for which, again, the claimant

received no prior warning that her job was in jeopardy. For the foregoing reasons, we conclude that the employer has failed to satisfy their burden of proving their case.

DECISION:

The administrative law judge's decision dated October 30, 2007 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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Elizabeth L. Seiser

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John A. Peno

AMG/ss

DISSENTING OPINION OF MARY ANN SPICER:

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 with an additional comment. In review of Ms. Klinker's testimony, there is a question of credibility as it relates to how fast she drives. Ms. Klinker stated in earlier testimony that she never would drive 80 miles an hour when, in fact, the evidence presented from the GPS report contradicted her statement. (Tr. 12, lines 28-30; Tr. 13, lines 31 – 34) Ms. Klinker questioned the GPS report's accuracy stating she didn't think she was at Handi-Mart for over an hour and 30 minutes, which immediately raises a question about the credibility of her entire testimony.

The employer verbally counseled the claimant several times in an attempt to get her to improve her behavior. The GPS was the last straw to bring this employee into compliance, which was within the employer's interest. Ms. Klinker, essentially, 'thumbed her nose' at any attempt the employer used to increase her productivity while performing her daily route. The employer's evidence was substantial and showed that Ms. Klinker willfully and blatantly lied during specific testimony that affected the employer's overall liability had the claimant continuously failed to follow policy. Thus, I would deny her benefits by affirming the administrative law judge's decision.

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Mary Ann Spicer

AMG/ss