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

MARK P HORNBACK Claimant, and ENTERPRISE RENT-A-CAR COMPANY MIDWEST Employer.	:	HEARING NUMBER: 09B-UI-10907 EMPLOYMENT APPEAL BOARD DECISION

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:

Mark Hornback (Claimant) worked full-time at Enterprise Rent-A-Car (Employer) as a branch manager beginning April 17, 2007 through the date of his discharge on July 2, 2009. (Tran at p. 1-2).

As part of his job benefits the Claimant was allowed to drive home a rental car owned by the business. (Tran at p. 2). He was only allowed to drive the car to and from work, and to no other locations. (Tran at p. 2; p. 5). The Claimant's father was going to pick him up at his home so they could take a trip, but was unable to pick him up so the Claimant drove his rental car to his father's house and left it parked there while they went on a trip. (Tran at p. 2-3). When they returned from their outing the Claimant

discovered that one of his father's neighbors had backed into the rental car damaging it. (Tran at p. 3). He reported the incident to the police and filled out a police report. (Tran at p. 3).

The Claimant reported the incident to the corporate office and provided them with a copy of the police report that listed the location of the incident as his father's driveway. (Tran at p. 3). On June 15 the Claimant's supervisor asked him whether the vehicle was at the business or in his driveway when it was hit. (Tran at p. 3-4). The Claimant told the Employer that the vehicle was parked "in my driveway." (Tran at p. 3). The Claimant indicated "my driveway" only to contrast it with the Employer's driveway, and did not intend to mislead the Employer. (Tran at p. 3-4; p. 6). The Employer saw in the police report that that the vehicle was not parked in the Claimant's driveway, but in his father's. (Tran at p. 4).

The Claimant was discharged for the stated reason of being dishonest with the Employer during the investigation of the accident. (Tran at p. 2). The Employer believed that the Claimant was trying to hide from them that he had driven the vehicle to a location other than the workplace. (Tran at p. 4). Had the Employer not believed this the Claimant would not have been fired. (Tran at p. 2). The Claimant had no prior warnings for any conduct. (Tran at p. 4; p. 6).

The Employer has failed to prove by a greater weight of the evidence that the Claimant intentionally lied to it during the investigation on June 15.

REASONING AND CONCLUSIONS OF LAW:

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).

More specifically even a single instance of lying to an employer to cover-up a workplace error can itself be misconduct. *White v EAB* 448 N.W.2d 691 (Iowa App. 1989). In *White* a nurse made a charting error, a matter of simple negligence that ordinarily is not misconduct. When she was questioned about it the employee "denied the situation and provided misinformation." *White* at 692. The Iowa Court of Appeals found substantial evidence to support disqualification based on "claimant's lack of candor when questioned about the incident." *White* at 692.

Here the Employer did not follow directions and did not appear at the telephone hearing. 871 IAC 26.14(7)a-c. Even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. See Hy Vee v. Employment Appeal Board, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer]). Under the rules of the Department "a party's failure to participate in a contested case hearing shall not result in a decision automatically being entered against it." 871 IAC 26.14(9). Thus judgment is not automatic when the party with the burden fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

We find the Claimant credible when he says he was not trying to mislead the Employer. He explains that when he replied "my driveway" upon prompting he was only intending to answer whether the car was hit at work in the driveway, or not. This rings true to us. This is especially so, given that the Claimant clearly described the location of the accident in the police report and provided this report to the Employer. We conclude that the Employer has not proven that the Claimant lied, and therefore conclude that the Claimant was not terminated for misconduct.

DECISION:

The administrative law judge's decision dated August 31, 2009 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

RRA/fnv

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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Monique F. Kuester

RRA/fnv