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

BRADLEY K OVERTON Claimant, and AMERICAN ORDNANCE LLC Employer.	:	HEARING NUMBER: 09B-UI-10168 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 DENIED

The employer 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, Bradley K. Overton, was employed by American Ordnance, LLC from October 30th through June 3, 2009 as a full-time production worker. (Tr. 2) On May 28, 2009, Rick Fisch (security officer) worked the exit gate and as a part of his daily routine randomly searched employees' bags and found several new, 15 oz. aerosol spray cans of degreaser (Tr. 25) in claimant's lunch cooler. (Tr. 3) Fisch believed these items were property of the employer. He also searched a half gallon cooler in which the claimant brings ice water to drink every day and found several items that appeared to be trash along with Dove daily hydrating cleansing cloths. (Tr. 4, 13, 24) Mr. Overton had previously brought a cup of jello, can of fruit; and crackers and potato chips in his cooler for lunch that day. (Tr. 15)

The claimant denied that the items and trash were his. (Tr. 4) When claimant went to open the lid of the lunch box cooler unbeknownst to him it was hung up by some cans of the degreaser that were wedged in place. (Tr. 4, 26-27) He said, "This is bullshit, this has got to stop" when asked to explain what the items were. (Tr. 4, 24) A plastic bag was looped to the lunch cooler handle and contained two cans of degreaser covered by two blue latex rubber gloves. (Tr. 4-5, 26-27) Mr. Overton wears wrist braces at work periodically and stores them with aspirin and muscle cream in the plastic bag tied to the cooler. (Tr. 23, 30)

Mr. Overton indicated that he noticed nothing odd at break when he drank all of the ice water and ate his lunch. He did not see his lunch box and cooler again until he was getting ready to leave work, three and one-half hours later. As a result of the random search and discovering company property in his lunch cooler, an investigation ensued. (Tr. 10)

The investigation revealed that Mr. Overton used to work in small engine repair while self-employed for approximately 20 years prior to coming to American Ordnance. (Tr. 10, 19) Mr. Overton had used solvent as opposed to degreaser back then and had no use for degreaser in his current capacity. (Tr. 19) The employer terminated Overton believing he was stealing company property. (Tr. 3-4)

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.

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 employer is more credible that the claimant was stealing several items via his lunch box. When Fisch discovered several cans of degreaser in the cooler during that random search, the claimant displayed 'shaking' behavior. Although Mr. Overton attributes this 'shaking' to his medical condition for which he takes medication, the employer noted that the claimant's hands were steady when he opened cooler, and began to 'shake or tremble' when he opened the lunch box. (Tr. 4) The claimant's overall demeanor at that time was surreptitious and very nervous. The claimant is not credible that his hands shake all the time.

In addition, we find it hard to believe that Mr. Overton had no idea there was anything in his lunch box (Tr. 14) considering the fact that there were at least three, 15 oz., full cans of degreaser (approximately 5-6 lbs) in what should have been an empty container. According to his testimony regarding what he brought for lunch, there presumably would have been empty containers/wrappers for a cup of jello, can of fruit, and crackers and potato chips. (Tr. 15) These items would have weighed considerably less than canned items filled with liquid. Also, when we consider the claimant's vast previous work experience involving small engine repair, it is equally difficult to believe he had so little knowledge about degreaser at all, which contributes to his lack of credibility. Based on this record, we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated August 14, 2009 is **REVERSED**. The claimant is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a"

See also, Iowa Code section 96.6(2) (2009) that provides, in pertinent part:

> ...If an administrative law judge affirms a decision of the representative, or the Appeal Board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5....

Although this decision disqualifies the claimant for receiving benefits, those benefits already received shall *not* result in an overpayment

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

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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John A. Peno

AMG/fnv

A portion of the employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv