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

ELIZABETH H GREENWELL	:	
	:	**HEARING NUMBER:** 16B-UI-01741
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
PROFESSIONAL TRANSPORTATION 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: 96.5-2Z

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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 the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Administrative Law Judge's findings of fact are adopted by the board as its own.

The Board makes the following 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 law limits disqualification to current acts of misconduct:

> *Past acts of misconduct.* While **past acts and warning can be used to determine the magnitude of a current act of misconduct**, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

71 IAC 24.32(8)(emphasis added); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985).

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 has proven carelessness and/or negligence in connection with each of the three motor vehicle collisions. The Employer has proven a pattern of carelessness by the Claimant of such a degree of recurrence as to constitute misconduct under rule 24.32(1)(a). Specifically, we conclude that the Employer has proven a pattern of carelessness by the Claimant that is of "equal culpability" to a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees." "Culpability" is defined by Black's Law Dictionary to mean "blameworthiness." *See also Webster's Third International Dictionary, Unabridged*, (1961)(giving "blameworthiness" for definition of

culpability). Black's goes on to provide that even in criminal cases "culpability requires a showing that the person acted purposely, knowingly, *recklessly, or negligently* with respect to each material element…" The word "culpable" is defined in Black's to mean "1. Guilty; *blameworthy* 2. *Involving the breach of a duty*." Webster's massive unabridged dictionary notes that the stronger sense of "culpable" meaning "criminal" is in fact "obsolete." Instead for modern definitions of "culpable" the 3rd unabridged gives "meriting condemnation or censure esp. as criminal <~ plotters> <~ homicides> or *as conducive to accident*, loss, or disaster <~ *negligence*>." *Webster's Third International Dictionary, Unabridged*, (1961)(emphasis added). Applying the standards of rule 24.32(1)(a) governing repeated carelessness we find that the claimant's pattern of carelessness proven on this record demonstrates negligence of such a degree of recurrence as to constitute culpable negligence that is as equally culpable as intentional misconduct.

We address specifically a couple arguments made by the Claimant. On the second incident the Claimant's attorneys argue *now* that it was some instrumentality, largely unidentified in the record, other than the Claimant responsible for the accident. The Claimant was there, and *she* does not disavow responsibility. She got in the van and no one was there, exited the van, no one was in it, and then the van struck the other vehicles. We base our decision on the evidence given by the Claimant herself, and find that it was her negligence that was responsible for the vehicle she had just exited crashing into two other vehicles.

On the third incident we do not base a finding of misconduct simply on the fact that the Employer has a zero tolerance policy for hitting trains. The fact that the Employer terminated the Claimant over hitting the train establishes that this is the incident which must be examined when deciding whether misconduct caused the termination. It does not establish misconduct. At this point the analysis proceeds by answering the following two questions: (1) What was the "but for" cause of the termination? (2) Did this "but for" cause rise to the level of misconduct? What caused the termination is a factual issue and depends on the record evidence. Here there is no doubt that hitting the train caused the termination. Whether hitting the train rises to the level of misconduct is based on the application of the law of misconduct to the facts of the case. Thus this ultimate issue does not depend on what the Employer thinks, or what the Claimant thinks, but on the legal standards and how those standards should be applied. But the Employer need not at the time of termination have in its mind a picture of all three incidents in order for us to look to the Claimant's *history* when deciding if that history will *enhance the seriousness* of the current act that triggered the discharge.

Consider if it were otherwise. The Claimant would have it that the zero tolerance policy violation means that no other act may be considered no matter how similar, no matter if it was brought to the Claimant's attention through warning or instruction. So what would be the effect of Claimant's position if the Claimant had struck another vehicle rather than a train? In such a case it would not be a zero tolerance issue. Suppose the Employer then considered all three accidents in the termination. Under the Claimant's theory we *then* could consider all three incidents, and only then could disqualify on a repeated negligence theory. Such an approach means that people who commit negligence which the Employer considers very serious will get benefits because no other incident can be used to enhance seriousness, whereas if they had committed less serious negligence they would not get benefits. This outcome strikes us as perverse. And it is contrary to the law. The bottom line is that the cause of a discharge is determined by the evidence alone, but whether that cause is serious enough to constitute misconduct is determined by the application of legal standards. *See Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007)(whether an absence is unexcused is an issue of the legal standards not the employer's policies). That the Employer has a zero tolerance for a certain flavor of negligence does not automatically deny benefits, but neither does it prevent consideration of prior incidents when deciding the "degree of recurrence" of negligence.

In closing, we are aware that sometimes it seems to litigants that on a remand on legal issues the agency will inevitably issue the same decision and the whole process is a matter of going through the motions. That is not the case with the Board, and not in this case. Two Board members had not even seen this case before, and all three members had a serious and sustained deliberation over the facts, and most particularly over the legal standards governing cases such as this. It was only then that the Board voted as it does today to find that the Employer did indeed prove negligence of such a degree of recurrence as to be equally culpable to "a 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."

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv