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

MATHEW R BOON	:	
	:	HEARING NUMBER: 09B-UI-08321
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION AFTER GRANTED REHEARING
THE CBE GROUP INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

SECTION: 96.5-2-a

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. On appeal to the district court the determination of the Board, that there had been no disqualifying misconduct, was affirmed. The Court remanded the matter "for further findings of fact regarding alleged violations of petitioner's employee handbook by bringing a recording apparatus into the company." 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 **ADDITIONAL FININDS & CONCLUSIONS**:

FINDINGS OF FACT:

As the certified record has been filed in district court, and both parties have access to it, we refer to the page numbers of the certified record for convenience only. We do understand that the Court did not retain jurisdiction and so we will issue this decision as a final order subject to the same appeal procedure as any other case.

In making our findings in this remand proceeding we must first consider what the record consists of. The Employer never offered at hearing a copy of the handbook provisions we are supposed to consider. It was not even offered as a proposed exhibit. (Cert. Rec. at p. 7-18). In its appeal to the Board the Employer attached that information to its brief. The Employer had no reason not to offer this policy

before and yet it did not. This additional evidence was specifically excluded from consideration by us.

(Cert. Rec. at p. 88-89). Pages attached to a brief are not evidence and we have been reversed by the appellate courts for considering such attachments as evidence. *See generally* 486 IAC 3.1(7)(process for considering new and additional evidence on appeal to Board); *Carr v. Iowa Employment Security Com'n*, 256 N.W.2d 211 (Iowa 1977)(due process violation to consider documents attached to argument). Here the District Court left our exclusion of this handbook undisturbed.

The closest the actual record contains to such a policy is:

> Employer: Violated a company policy in regards to recording conversations within the company and bringing a recording apparatus into the company was not – that was not approved, and removing recordings from the company unauthorized.

(Cert. Rec. at p. 22). The Employer has not proved that it had a policy that prohibited the Claimant from bringing a recording device into the office in order to record the conversation that he recorded in this case.

Even if we were to consider the information attached to the Employer's previous brief (it did not file one on remand) we still would not find the policy covers this situation. The policy in question refers to "hardware." One normally does not think of a tape recorder as "hardware." This term typically refers to computer equipment or to metalware. The policy goes on to refer to USB memory sticks, printers, cameras, video equipment, laptops, and "any other hardware peripheral." (Cert. Rec. at p. 79). The policy, moreover, is the second half of the "personal software & hardware" policy. (Cert. Rec. at p. 78). In context the phrase "hardware peripheral" refers to stuff one might hook up to the computer. Like a memory stick or a digital camera. Not a hand-held tape recorder. After all what was his tape recorder a peripheral to, except perhaps the Claimant's pocket? Even admitting the Employer's new and additional evidence we cannot find that *any* policy of the Employer, including Section VI, subsection N of the Employer's Handbook, prohibited the Claimant from bringing a recording device into the office in order to record the conversation that he recorded in this case. Even assuming that the policy did apply, we also find that the Employer has failed to prove that the Claimant knew or should have known that his actions on the day in question would violate *any* policy of the Employer including Section VI, subsection N of the Employer's Handbook.

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).

As we have ruled above there was no policy in this case that was specific to preventing the Claimant from bringing in the tape recorder. In our previous ruling we found that using the thing was not misconduct. This has been affirmed on appeal. We now must address whether it was acceptable to use the tape recorder but not acceptable to have it. At first blush this issue does not make a great deal of sense. Surely, one must have a thing before one may use it. But reading the Court's entire decision illuminates the point. The Court remand was to "determine if claimant's personal tape recorder was unapproved hardware *as defined by the employee handbook.*" The Court wants an answer to the question of whether there was a specific policy that covered bringing in the tape recording, in which case the Employer could be expected not to have one prohibiting its use.

We have found that there was no policy that could be reasonably taken to cover bringing in a tape recorder as the Claimant did in this case. Even if we were to stretch our interpretation of the Employer's handbook to cover the situation still we would not find misconduct. The fact that the Claimant had no idea that bringing in the tape recorder would violate the handbook is entirely credible. It takes some pretty creative reading to even argue that the policy covers this. Even assuming that the Claimant did violate the handbook by bringing in the tape recording we cannot find a "willful or wanton disregard of an employer's interest" in violating a policy whose application to the situation so debatable.

Reverting then to more general responsibilities of an employee – such as honesty and loyalty – we cannot find that the brining in of the recording device was any more disloyal or dishonest than using it. And our ruling that use was not misconduct has been affirmed. The Employer has not proven misconduct by the Claimant.

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John A. Peno

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Elizabeth L. Seiser

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Monique Kuester

RRA/ss