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

YOUNGESS DERBAL	:	
	:	**HEARING NUMBER:** 11B-UI-01140
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
SWIFT PORK COMPANY	:	
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, 96.3-7

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:

Youness Derbal (Claimant) worked for Swift Pork Co. (Employer) as a full-time production employee from July 26, 2010 until he was fired on November 3, 2010. (Tran at p. 7; p. 12-13).

On October 29, 2010, the Claimant had an accident while driving a pallet jack. (Tran at p. 7; p. 8; p. 9; p. 13-14). He caused damage to a piece of equipment. (Tran at p. 9-10). He was not going too fast for the equipment under the circumstances. (Tran at p. 14; p. 15). He hit the equipment because he was forced to swerve by someone coming in front of him suddenly. (Tran at p. 10; p. 14-15). He was fired over the accident. (Tran at p. 7).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2011) 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).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's testimony that he was not warned. In the alternative, we find that if the Claimant was warned, he did not understand the import of the warning. We turn then to the alleged final act.

When an allegation of misconduct 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). Carelessness may be considered misconduct when an employee commits repeated instances of ordinary carelessness. Where the employee has been repeatedly warned about the careless behavior, but continues with the same careless behavior, the repetition of the careless behavior can constitute misconduct. *See Greene v. Employment Appeal Board*, 426 N.W.2d 659, 661-662 (Iowa App. 1988). "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board,* 616 N.W.2d 661, 666 (Iowa 2000). When the issue is poor performance, what is required is "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board,* 616 NW2d 661, 668 (Iowa 2000). Where we are looking at an alleged pattern of negligence we consider the previous incidents when deciding if there is indeed a "degree of recurrence" that evidences the necessary culpability.

For something to have "recurrence" it most occur more than once. The Employer proved one incident of alleged negligence by the Claimant. No recurrence of negligence at all is shown. In fact, the only meaningful evidence on the accident is from the Claimant. The statement submitted by the Employer concerns what things looked like *after* the accident. The Claimant testified – and we believe him – that before the accident he was driving an appropriate speed and that someone coming in front on him suddenly caused the accident. If this were negligence it would be negligence in an isolated instance and not disqualifying. Yet on this record it is not even negligence. Indeed, the case is similar to *Lee* itself. In *Lee* the claimant's last two accidents were "Lee swerved his truck off the road to avoid hitting an oncoming car, and the other happened when Lee hit a power line partially obstructed from view by overhanging tree limbs." *Lee* at 666. The Court noted that "[t]here is no evidence other than Lee's testimony as to how these accidents happened. Under his testimony, we find, as a matter of law, no negligence." *Lee* at 666. Just so in this case, the swerve to avoid a collision testified to by the Claimant is not even negligence.

Even counting the warning as an incident of negligence we cannot find misconduct. At most two incidents appear. Thus the Employer could prove the minimum requirement for recurrence to occur. This weighs against a finding of disqualifying negligence. Still, under the right circumstances, twice may be enough to show "equal culpability" to intentional misconduct. Based on this record, however, we cannot make this conclusion. There is no reason to think that the Claimant was anything but absent minded on one occasion, and had an ordinary accident on the second. He was careless, but not reckless on either occasion. In our judgment there is an insufficient pattern of negligence to show that the Claimant had wrongful intent or equal culpability. In short, the Employer has proved only "inadvertencies or ordinary negligence in isolated instances" which is not misconduct. 871 IAC 24.32(1)(a). Of course, since we found the second incident was not negligence then, even counting the warning, we are left with a single instance of negligence (the incident leading to the warning) which is not disqualifying and, in any event, not a current act of misconduct. Benefits are allowed.

DECISION:

The administrative law judge's decision dated April 14, 2011 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

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