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

DENNIS LICUP	:	
	:	**HEARING NUMBER:** 10B-UI-17902
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
PRIORITY COURIER 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: 96.5-2A

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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Dennis Licup, was employed by Priority Courier, Inc. from July 28, 2008 through October 27, 2009 as a full-time driver. (Tr. 3, 11) The claimant understood from Dennis Gisesler that his start time was 6:00 p.m., however in an effort to obtain additional hours, he generally came in between 5:00 and 5:30 a.m. (Tr. 3, 11, 13, 19, 24) The employer never complained about his coming in early. (Tr. 13) Mr. Licup oftentimes worked until 4:30 or 5:00 p.m. (Tr. 11) The claimant maintained his hours using the 'honor system' by recording his time in writing on a timesheet. (Tr. 6, 9) On August 4th, the employer issued a written warning to the claimant for failing to call in to report his tardy and absence that day; he did not sign this warning. (Tr. 7, 9-10, 13, 19, 23, Claimant's Exhibit C)

Sometime in August of 2009, the employer installed an automated time clock; however, official use of this time clock did not occur until mid-September of 2009. (Tr. 10-11) The employer noted that Mr. Licup's timecard reflected that he had been tardy 9 days out of 15 immediately following the usage of the automated time clock. (Tr. 4-5, 13)

The employer has a policy that prohibits unauthorized passengers in company vehicles. (Tr. 4, 12) On two occasions, however, the employer allowed Mr. Licup to pick up his son, as several other employees had been allowed to have unauthorized people in the van. (Tr. 12, 17, 24-25) On October 23rd, Mr. Licup's son called him for a ride at 3:00 p.m. to which the claimant picked him up at 3:15 p.m. because he missed his school bus. (Tr. 12, 16) Dennis Geisler, a co-worker (Tr. 7), observed the claimant's son in the company truck at Duds N Suds, and reported the matter. (Tr. 4, 18, Claimant's Exhibit B)

On October 27th, the employer called Mr. Licup into the office and told him to "…go home and never come back…" without explanation. (Tr. 11-12, 15) It wasn't until the Fact-finding interview that he learned of the specific reason for his discharge. (Tr. 11-12,. 15, 25) The only warning the claimant received from the employer was on November 9th, well after his termination (copy of e-mail dated October 29th). (Tr. 15-16, 17, Claimant's Exhibit A) He received a copy of the termination letter, along with the August 4th memo during the Fact-finding Interview (Tr. 19-20, Claimant's Exhibits B & C) Mr. Licup had been terminated for having his son in the company vehicle without authorization, coupled with his previous 9 instances of tardies. (Tr. 25)

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 record establishes that one of the reasons for the employer's decision to terminate Mr. Licup was his excessive tardies. (Tr. 4-5, 13) The claimant denies that he was tardy arguing that his start time was 6:00 a.m., even though he, himself, chose to come in early in an attempt to obtain additional hours. (Tr. 3, 11, 13, 19, 24) The employer does not refute the times he came in, other than to say he was late as opposed to 'early' according to the claimant. If we believe Mr. Licup, he was never late. On the other hand, if we were to believe the employer who alleges his start time was 5:00 p.m., he was tardy numerous times. Be that as it may, we agree with the claimant that no warnings were ever issued with regard to excessive tardiness. It would seem that after one solid week of tardies, the employer would have, at least, verbally warned the claimant about his time. Based on this record, that did not happen. The claimant was never on notice that his coming in early, or late, as it were, was a problem.

It appears that the only warning issued occurred on August 4th, which the claimant denied ever receiving. While the employer argues that he refused to sign it, the fact that the August 4th memo was unsigned tends to corroborate the claimant's testimony that he did not, in fact, receive it. (Tr. 7, 9-10, 19) Again, the claimant did not know that his job was in jeopardy (Tr. 16-17, 20), as he had never been warned (Tr. 25)

As for the employer's policy that prohibited unauthorized passengers from riding in company vehicles, evidence supports that it was common practice for employees to get permission and have non-company passengers in the van. Mr. Licup provided unrefuted testimony in this regard as well as testified to two previous occasions in which he picked up his son in the company vehicle. The final incident appears to have been, more or less, an emergency situation wherein his son missed his bus and required a ride from his father just prior to the claimant's getting off work. (Tr. 12, 16) Even though the claimant, admittedly, had no permission, he didn't hesitate to pick up his son based on his previous experience. Given the employer's lax compliance with their own policy, how was Mr. Licup to know that his behavior this one time would cost him his job? The claimant admitted that had he been given any type of warning prior to his discharge, he surely and reasonably would not have allowed his son a ride in the company vehicle. (Tr. 17) At worst, his action on October 23rd was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. For this reason, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated January 12, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. 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

AMG/fnv