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

MICHEL R SCHEIN	:	
	:	**HEARING NUMBER:** 10B-UI-02830
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
HEARTLAND EXPRESS INC OF IOWA	:	

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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Michel Schein (Claimant) was employed as a full-time over-the-road driver by Heartland Express (Employer) from March 4, 2009 until his was fired on January 15, 2010. (Tran at p. 2; p. 6).

The Claimant had no prior warnings about safety from the Employer. (Tran at p. 4). The Employer had no policy addressing the presence of flammable materials in the cab of its tractors. (Tran at p. 4).

The Claimant obtained a generator and a can for carrying gasoline, and kept them in the cab of his tractor. (Tran at p. 3; p. 6; p. 7). The Claimant intended to use the generator to power a microwave in the event that he was stranded while out on the road. (Tran at p. 3; p. 7). He had not yet put any gas in the can. (Tran at p. 7; p. 8). He had emptied the generator, which had been used once before. (Tran at p. 9-10).

On January 15, 2010, the Claimant was at the company's Columbus, Ohio, terminal and Operations Manager Cliff Chapman received a call from the head of the service department. (Tran at p. 3). The gas can and generator were found under the bunk in the sleeper portion of the tractor. (Tran at p. 3). The Claimant is also a smoker and although smoking is not prohibited in the tractors by the Employer, this fact added to the Employer's concerns. (Tran at p. 4-5). As a result of those concerns the Claimant was fired for violation of safety standards. (Tran at p. 4-5; p. 6).

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).

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 the gas can was empty and that he was unaware he was violating any company rules. We do understand the Administrative Law Judge's point about the Claimant's explanation of the empty can. If the Claimant were stranded where would he get gas, and if he could get gas then wasn't he no longer stranded? We have still found the Claimant credible for a couple of reasons. First, it is true the empty can shows a lack of foresight. But the whole generator-to-power-a-microwave idea seems, frankly, unworkable, and the empty gas can seems to us just another example of a lack of thought that went into the plan. It seems that this is one of those ideas that looks better on paper, and that the Claimant at some point realized this. (It is also possible the Claimant was waiting until a big enough threat of being stranded before filling up). Second, if the gas can were not empty we do not think the Claimant would have been so insistent that the Employer go out to the cab to look at it. (Tran at p. 9). We have thus found that the can was empty as asserted by the Claimant. This being the case the safety concern cited by the Employer is not present and misconduct is not proved.

Even if we were inclined to think the can had some gas in it we would still not deny benefits. The Claimant was simply trying an idea to make himself more comfortable in the event of delay. If his actions posed a risk, it was to himself more than anyone else. Certainly, he did not intend to place his own life at risk, whether he did so or not. In addition, there was no specific policy that would have made clear to the Claimant that his idea was against the rules. No doubt this is why he did nothing to hide what he did. What we have is an example of very poor judgment, but no malice or willful disregard of the Employer's interests. The Employer testified that "this was considered an isolated incident," and we are inclined to agree. (Tran at p. 4). A good faith error in an isolated instance is, by rule, not misconduct. 871 IAC 24.32(1)(a).

We do not question the decision to terminate the Claimant out of the fear that he would show similar poor judgment in the future. (Tran at p. 5 [fear of "reckless nature"]). This may very well be a compelling reason for a termination. But while the Employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983). Thus, in any case, the issue is not whether there was a risk that the Claimant might, in the future, do similar things. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant had *already* committed intentional misconduct or repeated negligence of equal culpability. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated April 7, 2010 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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Monique Kuester

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Elizabeth L. Seiser

RRA/ss