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

RYAN D GALLAGHER	:	
	:	**HEARING NUMBER:** 11B-UI-05871
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
NORTH IOWA FOUNDATIONS	:	
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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two 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:

Ryan Gallagher (Claimant) worked for North Iowa Foundations (Employer) from August 10, 2007 until he was fired on March 25, 2011. (Tran at p. 2; p. 9). As part of the Claimant's job duties he was required to drive vehicles owned by the Employer. (Tran at p. 2). The Employer updates its drivers' records annually. (Tran at p. 3).

The Claimant was ticketed in 2010. (Tran at p. 10). A fine was levied but the Claimant did not pay it. (Tran at p. 9-11). As a result the Claimant's license to drive was suspended. (Tran at p. 9-10). In March of 2011 the Employer's insurance carrier notified the Employer that the Claimant would no longer be covered because he did not have a valid license. (Tran at p. 2; p. 20; Ex. 1).

Although the Employer took into account other infractions by the Claimant, as detailed by the Administrative Law Judge, we find that even without these infractions the Employer would have terminated the Claimant on the license issue alone. (Tran at p. 4, ll. 4-6; p. 9).

The available court records for the Claimant reveal that he was convicted on May 25, 2010 of failing to stop at a stop sign on April 24, 2010. In the normal course of procedure the Claimant would be notified of the fine and given a summons for a court date. Once the court date had passed and the Claimant not paid, he was sent a notice of non-compliance from the clerk on May 27, 2010. This notice, by law, would go out by regular mail. Iowa Code §321.210A(1)(a). On June 10, 2010 notice of the Claimant's conviction was sent to the Iowa Department of Transportation. Meanwhile, action was commenced by the Central Collection Unit of the Department of Revenue. On July 25, 2010 – sixty days after the fine was levied - the Iowa DOT filed a notice to suspend the Claimant's license and sent him a copy. *See* Iowa Code §321.210A(1)(c); 761 IAC 615.22(1); *see also* Iowa Code §321.210A(1)(b)(sixty days after nonpayment clerk sends nonpayment notice to Department).

We have taken official notice of these facts about the Claimant's violation because they are ones "whose accuracy cannot reasonably be questioned." I. R. Evid. 5.201. We need not give notice to these parties that we intend to take this notice since "fairness to the parties does not require an opportunity to contest such facts." Iowa Code §17A.14.

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:
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> 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 do not find credible that the Claimant merely forgot to pay his court fine, and lost track of the suspension of his license. The State has every reason not to be subtle when trying to use a threat to a license as an incentive to pay a debt. Accordingly the Code and regulations detail repeated notice that must be given. The Claimant would have it that he forgot about his summons and missed the notice from the Court about nonpayment, and missed the notice of suspension. We do not find this credible. This conclusion is bolstered by, although not dependent upon, the facts that the Claimant also has to claim he never saw any of the action taken by the Central Collection Unit (CCU) to get the money.

Since we conclude that the Claimant's nonpayment of his fine was not inadvertent we are not dealing with a case of negligence, isolated or otherwise. The Claimant knew he must have a license to work for his employer, as was made clear by the annual review.
Where an employee commits acts that impair the employee's ability to function on the job this can be misconduct even if the acts do not occur at work or during work hours. *See Cook v. IDJS*, 299 N.W.2d 698, 702 (Iowa 1980)("While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye.").

Here the off-duty actions of the Claimant are similar to the conduct found to be disqualifying in *Cook*. In *Cook* the employee was a driver who received numerous speeding citations. Although *Cook* retained his driver's license the employer's insurance carrier refused to cover him due to his record. The Supreme Court found that the discharge of Cook was founded on misconduct. Like *Cook* this case involves off-work conduct by the Claimant. Like *Cook* the Employer was not required by the criminal law to fire the Petitioner. Like *Cook* it is insurance that was the problem. And although the Claimant's driving problem was not repeated, as in it was in *Cook,* the Claimant did not lose his license for his driving. His license was suspended because of his choice not to pay the fine. He was sent notice by the Clerk of what would happen if he did not pay, he was sent notice by the Iowa DOT that he was suspended until he did pay, and yet he still did not pay. This is enough to constitute misconduct where the maintenance of a driver's license is a requirement of the Claimant's job. Here the Claimants misconduct would be made even more serious if the Claimant knowingly drove the Employer's vehicles after his suspension. Although the evidence suggests the Claimant did indeed drive the Employer's vehicles knowing he shouldn't, we do not resolve the issue since the knowing loss of the license was itself misconduct.

DECISION:

The administrative law judge's decision dated June 15, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Monique Kuester

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Elizabeth L. Seiser

A portion of the Employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (written warning) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Monique Kuester

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Elizabeth L. Seiser

RRA/lms