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

MELVIN C HINES

Claimant,

and

IOWA 80 TRUCKSTOP INC

Employer.

HEARING NUMBER: 09B-UI-05425

EMPLOYMENT APPEAL BOARD
DECISION

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 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:

Melvin Hines (Claimant) was employed as a full-time mechanic for the Iowa 80 Truckstop Inc. (Employer) from March 28, 2005 until the date of his discharge on March 10, 2009. (Tran at p. 3; p. 8). The Employer had previously written-up the Claimant for the stated reason of the Claimant allegedly not properly torqueing wheels he had replaced. (Tran at p. 5). The Employer has failed to prove by a preponderance that the problem in question was in fact the Claimant's fault. (Tran at p. 6; p. 10). The final incident that resulted in the Claimant's discharge was the Claimant's handling of a preventative maintenance (PM) service performed on March 7. (Tran at p. 4; p. 5; p. 6). The Employer believed that there were three failings in the PM service: failure to fill the oil filters, failure to jack up the truck, and

not checking the hubs for lubrication. (Tran at p. 4). Of these the most serious was not checking the hubs. (Tran at p. 4). The Employer also identified at hearing a problem with a kinked hose, but the Employer did not clearly identify this issue as a factor in the decision to discharge. (Tran at p. 4; p. 6). In any event, we have insufficient testimony about the kinking of the steering line to conclude that this was the result of the Claimant's negligence.

The greater weight of the evidence establishes that the Claimant was not properly trained on how to handle the oil filters in a PM service and that this resulted in his error on March 7th. (Tran at p. 7; p. 8-9; p. 12). The evidence also does not establish by a preponderance that the Claimant in fact failed to jack up the truck on March 7. (Tran at p. 10). Finally, the evidence does establish that the Claimant forgot to check the hubs. (Tran at p. 9). The Claimant had been distracted by the fact that service of the extended power unit had run into some difficulties and was taken much longer than usual. (Tran at p. 9-10). As a result the Claimant simply forgot about the hubs. (Tran at p. 9-10).

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).

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 constitutes 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).

As we have found the Employer has failed to prove that the Claimant is responsible for the torqueing error or that he failed to jack up the truck on the 7th. We are left with the oil filter and hub issues. The Employer has failed to prove that the Claimant intentionally decided that he would ignore his checklist. The Claimant credibly testified that he made the error on the oil filter because he had not been trained otherwise. We cannot find that the Claimant was even negligent in his handling of the oil filters where he had never been told to do otherwise. On the hubs, the Claimant admits he made a mistake but he claims, and the Employer has not proved otherwise, that his error was a result of a simple oversight.

Since there was no intentional misconduct proved in this case, disqualification could be justified only if the Claimant's error was "carelessness or negligence of such degree of recurrence as to manifest equal culpability… or to show an intentional and substantial disregard of the Employer's interests." Id. 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. The law provides that "[f]ailure in good performance as the result of … inadvertencies or ordinary negligence in isolated instances" is not disqualifying. Here there are no *proven* previous incidents of negligence by the Claimant and so there is no "degree of recurrence." We cannot find that the oversight with the hubs was more than a case of "ordinary negligence in isolated instances" that will not disqualify the Claimant from benefits. 871 IAC 24.32(1)(a).

The Board understands that proper maintenance and quality work is very important to the Employer. The Claimant's errors may very well be 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 the importance of the policy the Claimant violated. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant 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 May 8, 2009 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.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

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