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

ALAN R NORTON	:	
	:	**HEARING NUMBER:** 11B-UI-15783
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
PIONEER HI-BRED INTERNATIONAL 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: 96.5-2-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. 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:

The claimant, Alan R. Norton, was employed by Pioneer Hi-Bred International, Inc. from July 22, 1999 through October 12, 2010 as a full-time technician 2. (Tr. 2-4, 10-11, 22) On February 27, 2006, the employer issued a written warning to the claimant for talking on the cell phone regarding a business matter during work hours in violation of company policy. (Tr. 5, 13) He later received training for which he signed off regarding safety issues that included no talking on cell phones when operating company vehicles at any time. (Tr. 12)

During the summer of 2006, Mr. Norton was laid off at which time the employer implemented a new policy, which the claimant was unaware of when he returned. He signed return documents believing them to consist of the same policies. (Tr. 12) That policy allowed employees to "…use [their] best judgment to determinate if an area is safe for stopping. Safe stopping …includes…parking lots…" (Exhibit 1-unnumbered p. 8)

Mr. Norton received another warning nearly two years later (August 14, 2008) for not following proper repair procedures. (Tr. 5-6)

The employer implemented a 'life saving rule' in 2008 that required immediate termination due to the severity of the rules. (Tr. 7, 17) Mr. Norton received training for which he signed in acknowledgement of receipt on both August 25, 2009 and April 6, 2010. (Tr. 7, 17, 21, Exhibit 1-unnumbered p. 2)

On October 4th at approximately 2:30 p.m. as the claimant got off work and was about to leave the parking lot in his personal vehicle (Tr. 8-9, 11-12), Doug Webster observed Mr. Norton "…talking on [his personal] cell phone on company property…" (Tr. 4, 8, 10) The following day, the employer questioned the claimant about his behavior to which the claimant explained that after he got off work, his truck did not initially start. He called his wife for a ride; however, upon trying the truck, again, it started. He then called his wife back to tell her not to come pick him up. (Tr. 10, 18) A week later, the employer terminated him for violating the company's 'life saving rule.' (Exhibit 1-unnumbered p. 1)

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).

There is no dispute that the employer had a mobile phone policy in place for which the claimant signed in acknowledgement of receipt. (Tr.12, Exhibit 1-unnumbered p. 8) However, in looking at the final incident that led to Mr. Norton's termination, we must consider his action in the context of its occurrence. The claimant used his cell phone at the end of his workday, as he was leaving the company parking lot. (Tr. (Tr. 4, 8-9, 10, 11-12) Not only was Mr. Norton no longer on company time, he was on his own cell phone, in his own vehicle when he made the brief call. He reasonably believed that the cell phone policy pertained only to company vehicles while on company time, which is not without merit given the underlying purpose of the 'life saving rule,' i.e., to prevent on-the-job accidents and consequently minimize employer's liability for the same.

Mr. Norton's use of his cell phone was done in good faith under the circumstances, as he wanted to intercept his wife whom he had just called for a ride when his truck had initially failed to start up. His action, though unknowingly contrary to policy, lacked a "…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…" See, 871 IAC 24.32(1)"a", supra. 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). At worst, we conclude that his behavior on October 4th (Tr. 11) was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated December 28, 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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Monique F. Kuester

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Elizabeth L. Seiser

AMG/fnv