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

BRYCE E ALEXANDER	:	
Claimant,	:	**HEARING NUMBER:** 08B-UI-08627
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
VAN DIEST SUPPLY CO	:	
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 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:

Bryce Alexander (Claimant) worked for Van Diest Supply Co. (Employer) as a full-time production team leader from January 1, 2002 through the date of his discharge on August 28, 2008. (Tran at p. 5-6). Because of the nature of the Employer's product the Employer's facility is equipped with an explosion suppression system. (Tran at p. 7-8). This system triggers when a sudden significant change in environmental pressure occurs. (Tran at p. 7-8). The system, when triggered, discharges water into the area. (Tran at p. 7-8). The Employer has signs warning employees that conduct such as dropping tools could trigger the system. (Tran at p. 11; p. 15). The Claimant had not been present during any prior discharge of the system. (Tran at p. 11). An employee found to have caused an accident that, in turn, caused property damage can be immediately terminated under the Employer's procedures. (Tran

at p. 8; Ex. 1).

On August 27, 2008 the Claimant was working with an air impact wrench. (Tran at p. 10; p. 12; Ex. 2-4; Ex. 6). The Claimant became frustrated when the tool didn't work properly. (Tran at p. 7; p. 10; p. 12-13; Ex. 2-4; Ex. 6). In his frustration the Claimant threw the tool on the floor. (Tran at p. 6; p. 7; p. 10; p. 12-13; Ex. 2-4; Ex. 6). This triggered the suppression system which caused significant expense to the Employer. (Tran at p. 6; p. 8; Ex. 2-4; Ex. 6-7). The Claimant informed his shift manager of his actions and the triggering of the system. (Tran at p. 7-8; Ex. 3; Ex. 5). The Claimant was terminated for his actions that caused the Employer significant expense when the suppression system triggered. (Tran at p. 10; p. 14; p. 15; Ex. 5).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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). 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).

The evidence does not establish that the Claimant intentionally tried to trigger the explosion suppression system. Since there was no intentional misconduct 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. Here there are no previous incidents of negligence by the Claimant and so there is no "degree of recurrence."

We are thus left with evidence of a good employee who made a single – albeit really big – mistake. Big though the error be, a disqualification decision is not based on the amount of damage caused by the negligence but on the actions of the Claimant prior to the damage being inflicted. Here the record shows the error resulting from an isolated act taken in frustration, namely, the all-too-familiar action of taking out frustration on the inanimate object that is the source of the frustration. True, the Claimant should have known better, but so too does the iconic person who kicks his broken-down car and hurts his foot. The action is as natural as it is foolish. The Claimant's training should have trumped his instinct, and this was his mistake. But it was not an intentional mistake and it was not sufficiently reckless that it showed an "intentional and substantial disregard of the employer's interests." The fact that the consequences of the Claimant's isolated act were very serious does not, by itself, establish misconduct.

We certainly understand why the Claimant was fired. 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). Again, the issue is not the magnitude of the damage cause by the Claimant. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed misconduct in causing the damage. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated October 14, 2008 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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Elizabeth L. Seiser

RRA/ss

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/ss