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

ANGELA L NEIRA	:	
	:	**HEARING NUMBER:** 10B-UI-05739
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
FIRST FLEET 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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer 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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Angela L. Neira, was employed by First Fleet, Inc. from March 24, 2004 through March 12, 2010 as a full-time over-the-road truck driver for roll products out of the employer's Cedar Rapids terminal. (Tr. 3, 4, 10, 22) The employer adheres to an "…industry standard for checking whether… [a driver has] successfully [and firmly] coupled a truck to a trailer. (Tr. 4, 8) This procedure requires performing a "…tug test…of the tractor against the trailer…also visually inspecting that connection [i.e., pre-trip inspection]." (Tr. 4, 33) Failure to properly 'couple' these transport structures could result in their coming loose and turning into a "30-ton projectile uncontrolled…on the highway…" that could "…risk life and property." (Tr. 6) If such an accident were to happen, the company would be "…on the hook for a million dollars of liability." (Tr. 13) Ms. Neira signed in acknowledgement of receipt of a personnel handbook when it was issued at several different intervals; once for a March 2009

update and on June 15, 2009. (Tr. 11, 13-15, Employer's Exhibit 1- unnumbered p. 1) Ms. Neira understood that she was required to always conduct pre-trip inspections prior to going on the road. (Tr. 31, 34)

The employer provides training 3-4 times yearly as well as the Annual Safety Week in Cedar Rapids, which all drivers are required to attend. (Tr. 9) During Safety Week, the issues of "…pre-trips, couple, uncouple…as well as knowledge of the law…" are covered. (Tr. 9) Pre-trip inspections are a requirement of both the employer and the Department of Transportation (DOT). (Tr. 9) It is the employer's 'standard practice' to terminate an employee involved in a 'serious near miss' accident as a result of that employee's failure to properly couple their trailer onto their tractor. (Tr. 6-7, 16) One such incident occurred in December of 2009 wherein the employer terminated an employee for having a 'serious near miss' when he failed to follow proper coupling procedure. (Tr. 6-7)

Ms. Neira accumulated six preventable accidents for which she received numerous counselings and warnings. (Tr. 11, 33-34) In February of 2008, the claimant was involved in an accident in Aurora, Illinois when she turned the truck into a snow bank. (Tr. 13, 28) The employer considered this a preventable accident, which cost the company $1966 to fix the tractor. (Tr. 13)

All drivers are required to turn in their log books by the 15th of each month. In an audit for the month of February of 2009, the employer learned that Ms. Neira violated the "…[federal] hours of service rules…" for which the employer issued a written warning for in April of 2009. (Tr. 12, 34) Violations of this rule could result in the DOT's levying fines against the employer. (Tr. 13) A subsequent audit in May of 2009 revealed another federal hours of service violation in her April logbook that resulted in a second written warning being issued on May 27, 2009. (Tr. 12, 34) On June 15, 2009, the claimant signed the May warning which indicated that "future violations will lead to additional disciplinary action and may include discharge." (Tr. 12, 34)

On July 14th, 2009, the Safety Department counseled Mr. Neira for receiving an overweight citation that she signed in acknowledgement and turned in "…some sort of a cash-bail deposit…" (Tr. 11, 12, 13, 17, 20, 27) The claimant had failed to scale her load prior to leaving for the road.

On March 12th, the claimant reported an accident at approximately to Matt Childs (General Manager) in Portland, Tennessee in compliance with company policy. (Tr. 5, 8, 18, 23) She indicated that she had a "disconnect…involving the tractor and [loaded] trailer…" (Tr. 18, 19, 23) which caused the trailer to fall onto the tires. (Tr. 4-5, 24, 25) When he questioned her as to whether she followed proper procedure by conducting "…a visual inspection of the fifth wheel and the kingpin to make sure that they had locked together…," Ms. Neira denied checking because the lot was too muddy. (Tr. 18) Mr. Childs also inquired whether she conducted a 'tug test' to which she also denied doing. (Tr. 19, 31) Childs told her she would be receiving a call from Pete Rowbotham (Regional Safety Manager) who called her shortly thereafter. (Tr. 3, 5, 10, 19) Ms. Neira told him that she 'forgot' to perform the tug test. (Tr. 24, 31) In the meantime, she had correctly recoupled the trailer, and proceeded onto the road. (Tr. 5, 24-25) Later that day, the employer via Matt Childs (Tr. 11) terminated Ms. Neira for "[f]ailure to follow adequate procedures…" (Tr. 4) "…for coupling and uncoupling." (Tr. 21, 22)

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:
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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.

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).

The record establishes that the claimant was a six-year employee who in those six years was involved in six prior preventable accidents. (Tr. 11, 20, 33-34) Her continuous failure to maintain proper log books after repeated warnings (Tr. 12, 34) demonstrated "…carelessness or negligence of such degree of recurrence as to manifest equal culpability…" in failing to comply with the employer's policy. The court in Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) held that a claimant's continued failure to follow reasonable instructions constitutes misconduct. The June 15, 2009 warning

she

received, which indicated that "future violations would lead to additional disciplinary actions and may include discharge," (Tr. 12) put her on notice that further infractions could jeopardize her continued employment.

Other evidence supports that Ms. Neira had knowledge of her responsibilities as a driver (Tr. 11, 13-15, Employer's Exhibit 1- unnumbered p. 1), particularly as it related to conducting pre-trip inspections. (Tr. 31, 34) Yet, she claimant repeatedly failed (contrary to her vast training and industry standards) to perform this duty. With regard to the overweight citation, had Ms. Neira taken the time to properly scale her load prior to leaving the terminal, she would have known that she was overweight and could have avoided the citation. Her subsequent failure to follow adequate pre-trip procedures by neglecting to perform the required "tug test" and/or visual inspection of the trailer to ensure that her transports were properly coupled was yet another recurring act of negligence. The claimant already had prior discipline for logbook updates and preventable accidents. Yet, even being on notice that her job was in jeopardy, she continued to exhibit behavior not in the employer's best interests.

The fact that the March 12th incident resulted in no damage is irrelevant in light of the federal mandates under which the employer is legally bound to operate. Accidents resulting from an employee's failure to comply could potentially cost the employer a million dollars in liability; hence, to avoid such liability, the employer has a policy that provides termination for "serious near misses." (Tr. 6-7) The claimant offered no valid reason for failing to comply with company policy. An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985). Good faith under this standard is not determined by the Petitioner's subjective understanding. Good faith is measured by an objective standard of reasonableness. "The key question is what a reasonable person would have believed under the circumstances." Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988); accord O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993) (objective good faith is test in quits for good cause).

In this case, when asked why Ms. Neira failed to follow proper procedure, she indicated it was too muddy (Tr. 6, 18); that she was too short (Tr. 24); that she was told the tug test wasn't required (Tr. 24, 31,); and lastly, that she simply forgot (Tr. 24). There is no doubt the claimant knew the policy regarding coupling. (Tr. 22) As for her argument that the employer advised drivers to only do a visual test, and not the tug test, during the winter when the trailer was low, we find her testimony equivocal; and by her own testimony, she failed to do *either* test. (Tr. 24) Even if we were to accept and concede that she received conflicting directives, the claimant's actions contradicted her own understanding of what she was required to do. Additionally, the employer denied ever sending a directive, e-mail or otherwise, advising drivers not to perform the tug test (Tr. 32), which would have placed the employer in direct conflict with their own policy and DOT regulations. (Tr. 13) Thus, we find her reasoning for failing to conduct a proper pre-trip inspection unpersuasive and totally lacking in credibility.

The employer testified that the claimant had training available and the most current handbook at her disposal; yet, Ms. Neira chose to disregard what she should have known and was trained to do prior to each trip. Her behavior can only be characterized as a blatant disregard of the employer's interests,

which falls squarely within the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated July 12, 2010 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, she is denied until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I would also note and comment that near the conclusion of the claimant's testimony she asserts that the employer sent out an inappropriate email of a racial nature (Tr. 29-30), which was offensive in nature. If her allegation is true, then it would serve the employer to refrain from any such conversation or correspondence in the future, and to take into consideration how "off the cuff" comments can be perceived. While I am sensitive to the claimant's claim of discrimination, I do not find it relevant to the claimant's discharge.

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Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

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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John A. Peno

AMG/fnv