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

PERRY M CARDER	:	
Claimant,	:	**HEARING NUMBER:** 13B-UI-07686
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
CLEMONS INC OF OTTUMWA	:	
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:

Perry Carder (Claimant) worked as a full-time auto mechanic for Clemons Inc. (Employer) from February 14, 2011 until he was fired on June 8, 2013. The Claimant was a good worker generally and willing to do other tasks if requested. In late 2012 the Claimant was warned when a vehicle was returned by the customer a few days after he had done front end work. The lug nuts on one of the wheels was very loose and had to be tightened in the shop again.

On June 4, 2013, the Petitioner worked on a vehicle. After doing so he drove the car for a two mile test drive, and detected no problems. Two days later the customer had to have the car towed back in because it was shaking so hard. The wheel was so loose that the tire tipped sideways since the lug nuts had not been tightened. The Claimant was then fired for the stated reason of not tightening the lug nuts.

The Claimant in fact tightened the lug nuts on the second car with a torque wrench. Such nuts can come loose after tightening. Thus customers are often instructed to return for retightening after 100 miles. The Employer has failed to prove by a preponderance that the Claimant was responsible for the state of the wheel in June 2013 that caused the discharge.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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).

<u>*No Final Act Of Negligence Proven:*</u> 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 have found credible the Claimant's testimony that he did tighten the lug nuts with a torque wrench, and that he did drive the car for a test drive, noting no problems, after doing so. The Claimant was

a good worker who was forthright during the hearing. As for the undoubtedly loose lug nuts this is not a situation where the thing speaks for itself, that is, we cannot conclude solely from the fact that the nuts were loose that the Claimant was the one responsible. Obviously, if the tire were so loose it was falling off, then surely it would never have made it out of the shop. Further, the Claimant testified that nuts can loosen with driving after the wheel has been removed and worked on. Moreover, we do not know if anything was done to the car after leaving the custody of the Employer. Given these points we cannot find that the fact of loose nuts, by *itself*, overcomes the Claimant's first-hand testimony of tightening the nuts, and making a test drive. This being the case the Employer has failed to prove a final act of misconduct by the Claimant that could be considered misconduct.

Sufficient Negligence Not Shown: Even assuming that we were to decide that the Claimant did something to the car in question that caused that final problem still we would not disqualify.

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 can constitute 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). When the issue is poor performance, what is required is "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board,* 616 NW2d 661, 668 (Iowa 2000). 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.

At most two incidents appear. Thus the Employer could prove the minimum requirement for recurrence to occur. This weighs against a finding of disqualifying negligence. Still, under the right circumstances, twice may be enough to show "equal culpability" to intentional misconduct. Based on this record, however, we cannot make this conclusion. At most the Claimant may be perhaps mistaken about how well he tightened the nuts the second time. But it is quite unlikely he is mistaken about a test drive, as a two mile drive is not the sort of thing one mistakenly believes to have done. We thus do agree with the Administrative Law Judge that the Claimant did test drive the car, and even assuming some error in nut tightening this lessens further the showing of negligence – he did take precautions. Perhaps he was careless with the wrench, but he did tighten the nuts enough to survive a test drive, and leave the premises, and we have no reason to think that the tightening was not a good faith attempt. Also given the test drive we do not think the tightening was reckless, but was at most ordinary negligence. Given the Claimant's good record, the two alleged incidences of ordinary negligence would not, in our judgment, establish a pattern of negligence sufficient to show that the Claimant had wrongful intent or equal culpability. In short, the Employer has *at most* proven only "inadvertencies or ordinary negligence in isolated instances" which is not misconduct. 871 IAC 24.32(1)(a).

This ruling is in the alternative since our previous finding that the second incident was not proven to be negligence leaves, at most, a single instance of negligence which is not disqualifying and, in any event, not a current act of misconduct. Benefits are allowed under either ruling independently.

Fair Hearing: Finally, the Board makes clear that the Administrative Law Judge did nothing in this case that could be taken to be a denial of due process. The attorney for the Claimant asked the Employer "And you admit that leads to distraction wouldn't you?" to which the response was "I wouldn't think so but…" The attorney then remarked "It certainly could." This is not a question. Attorneys acting as representatives ask questions, not make statements and argue with witnesses. The Administrative Law Judge correctly pointed this out. We cannot fathom how due process mandates that the Administrative Law Judge allow testimony from a person who is not on the stand and who has no personal knowledge of the underlying facts. Further cross-examination also sought to delve into matters which are not even arguably relevant to this matter. Naturally, an Administrative Law Judge is allowed to control the hearing, and make sure that irrelevant matters do not take up tribunal time. Again, we see no way that due process requires the Administrative Law Judge to allow the asking of irrelevant questions. Stopping a party from asking such questions is a judicial action that displays no lack of neutrality whatsoever. We also point out that, although these hearings are not governed by the rules of evidence, for obvious practical reasons witness testimony about someone's character for truthfulness is usually not allowed except in limited circumstance. Specifically, the usual rule is that "[e]vidence of truthful character is admissible only after the *character* of the witness for truthfulness has been attacked…" I.R. Evid. 5.608(a)(2)(emphasis added). It was well within the Administrative Law Judge's discretion to deny the proffered testimony on a reputation of truthfulness. Naturally we deny any request for remand from the Claimant. Despite the Claimant's meritless argument about the fairness of the hearing, the Claimant today nevertheless prevails on the merits - after a perfectly fair process.

DECISION:

The administrative law judge's decision dated August 23, 2013 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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Cloyd (Robby) Robinson

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. I do, of course, agree with the majority about the fairness of the hearing to the Claimant.

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Monique F. Kuester

RRA/fnv