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

AMY I BRAAFHART	:	
	:	HEARING NUMBER: 09B-UI-09643
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
MAXX ENTERPRISES LLC	:	
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 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:

The Amy Braafhart (Claimant) worked for Maxx Enterprises Inc. (Employer) as a delivery driver from October 2008 until she was fired on January 13, 2009. (Tran at p. 3; p. 4, ll. 23-25; p. 11).

On January 6, 2009, the owner-manager, Max Flack, placed the claimant on a 30-day probation until February 7, 2009, for the stated reasons of lack of performance, customer complaints, misdelivered packages, an accident, and problems with the Claimant's attitude. (Tran at p. 3; Ex. 3). The Employer provided no specific proof on the number or nature of these previous misdeliveries. We can conclude based on the evidence only that there were at least two misdeliveries prior to January 6. (Tran at p. 6 [" more than one"]; p. ~12 [shared tracking equipment]). The circumstances of these misdeliveries are

not established by the record.

On January 10, 2009, the Claimant again delivered a package to the wrong address on a different street. (Tran at p. 3; p. 7; Ex. 1). On January 13 the Claimant did not come into work and so did not sign required report for the January 10 deliveries. (Tran at p. 4). The Employer discharged the Claimant for the package misdelivery and for the paperwork issue on January 13, 2009. (Tran at p. 2; p. 4).

The Claimant had no opportunity to sign the report for the 10th on that day. (Tran at p. 5). She could have signed the report on her day off but the employees are not required to do this. (Tran at p. 5). They generally come in on Tuesday to sign for Saturday reports. (Tran at p. 5). The Claimant was not scheduled to make deliveries on Monday, January 12. (Tran at p. 4). She did attend a company meeting on Monday the 12th, and she told the Employer then that she would` not be in on the 13th. (Tran at p. 9). Nothing was said about paperwork. (Tran at p. 10; p. 16). On January 13 the Claimant missed work because she was told not to go to work by her physician. (Tran at p. 5; p. 10-11; p. 14; Ex. A). The physician was treating the Claimant for an on-the-job injury. (Tran at p. 5; p. 10; p. 16). Since the 13th was payday the Claimant called in about her paycheck, and this is how she found out she was fired. (Tran at p. 11). The Claimant's husband never rode along as a helper except when authorized by the Employer. (Tran at p. 19).

We express no view on the Claimant's argument that she was fired in retaliation for having a Worker's Compensation claim.

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.

"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).

Failure to Sign Report: We doubt that the Employer would have terminated the Claimant for failure to sign the paperwork alone. Further we do think it likely that the Employer would have terminated based solely on the final misdelivery. This being the case it is not really necessary to address the failure to sign the report since this failure was not a "but for" cause of the termination. The Claimant was getting fired one way or the other. Nevertheless we will address the failure to sign incident briefly. As the Employer indicated it would seem perfectly acceptable for a sick employee to sign a report as soon as the illness clears up. (Tran at p. 6). The reasonableness of such a delay is obviously enhanced where a physician orders the Claimant to stay home, and even more where the injury in question is job-related. Also if it was so important we cannot understand why it was not mentioned on Monday when the Claimant made clear she would not be in the next day. We cannot find that the Claimant did anything by not coming in on Tuesday and so we completely disregard the failure to sign incident.

Final Misdelivery: 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).

For something to have "recurrence" it most occur more than once. Because the evidence supplied was so sketchy we can find that the Employer proved at best three incidents of errors by the Claimant. (Tran at p. 6). Thus the Employer has proved a minimal amount of recurrence. We have no idea how many misdeliveries are normal over the span of time the Claimant was working for the Employer. In fact we do not even know over what span of time that the Claimant allegedly had misdeliveries. The Employer, moreover, has not proved that the errors were due to an intentional decision by the Claimant to ignore proper procedure, as opposed to a sloppy execution of procedure. The errors, while very serious, were not shown to be anything but due to ordinary negligence – and even then we must draw an inference of negligence based on the fact of the misdelivery alone. In short, the Employer has proved only "mere negligence [which] is not enough to constitute misconduct." Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000).

In the alternative, even if we were to grant that the Claimant misdelivered packages *frequently* we cannot conclude based on this record that the problems were due to carelessness or disregard of established procedure. There is no evidence here of a pattern of improving after discipline and slipping in performance again. *See Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645 (Iowa App.1995)(such pattern suggests intentional slacking off). Instead the Employer's dissatisfaction with the Claimant's performance seems to be chronic. The Claimant worked for this employer only a few months and yet the Employer asserts frequent problems with her accuracy. Believing this the Employer would show an incapacity but not that the Claimant *ever* showed an ability to do the job in an acceptable manner. Thus we do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which [s]he usually worked." Lee v. Employment Appeal Board, 616 NW2d 661, 668 (Iowa 2000). We are left with poor performance and poor performance is not misconduct. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988); 871 IAC 24.32(1)(a).

The Board understands that delivering package to the correct address is extremely important to the Employer. Indeed, it is the essence of the business. The misdeliveries may very well be a 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 accurate deliveries by the Claimant. 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 July 27, 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

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv