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

CLINT C CARLSON Claimant, and BARKER EMPLOYMENT SERVICES INC Employer.	:	HEARING NUMBER: 09B-UI-02895 EMPLOYMENT APPEAL BOARD DECISION

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:

Clint Carlson (Claimant) was employed by Barker Employment Services (Employer) as a full-time driller's helper from March 2008 until the date of his discharge on January 10, 2009. (Tran at p. 3-5; p. 11). Joel Gray was the Claimant's superior at the Employer. (Tran at p. 3). The Claimant's immediate supervisor, however, was Butch Thayer. (Tran at p. 12).

On January 8, 2009 the Claimant was returning to Iowa from the jobsite in Nebraska, when he was pulled over near Atlantic, Iowa for failing to wear his seatbelt. (Tran at p. 5-6; p. 7; p. 12). The law enforcement officer cited the Claimant for failing to wear a seatbelt. (Tran at p. 5-6; p. 7; p. 12; p. 13). The Claimant was not wearing a seatbelt. (Tran at p. 14). During the stop, the law enforcement officer

determined that the Claimant had an outstanding Polk County warrant. (Tran at p. 13). The officer took

the Claimant into custody. (Tran at p. 13). The Claimant was jailed overnight in the Cass County Jail and then transported to the Polk County Jail. (Tran at p. 13). The Claimant had been operating the employer's vehicle at the time of the stop. (Tran at p. 5). Law enforcement impounded the employer's vehicle. (Tran at p. 6). On January 10, Mr. Gray notified the Claimant that he was discharged from the employment based on the failure to wear a seatbelt while operating the employer's vehicle. (Tran at p. 5; p. 6; p. 7; p. 12-13).

Mr. Carlson had concluded his usual workweek at the time of the law enforcement stop. (Tran at p. 7; p. 9). The Claimant had never been notified that he was subject to termination based on a single traffic violation while operating the Employer's vehicle. (Tran at p. 7; p. 15). The Claimant paid all fees associated with his stop. (Tran at p. 16-17; p. 18). The Claimant missed no work due to the stop. (Tran at p. 13-14; p. 15; p. 16). The car was assigned for the Claimant's exclusive use. (Tran at p. 18). The impounding of the car did not deny the use of the vehicle to any person, other than the Claimant. (Tran at p. 18-19). The Claimant simply forgot to put on his seatbelt. (Tran at p. 14). The Claimant has no prior tickets issued to him while driving the Employer's vehicle. (Tran at p. 14-15).

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.

"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).

Where an employee commits acts that impair the employee's ability to function on the job this can be misconduct even if the acts do not occur at work or during work hours. See Cook v. IDJS, 299 N.W.2d 698, 702 (Iowa 1980)("While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye."). Conduct that is contrary to established policies of the employer may be disqualifying even if the conduct is away from work. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416 (Iowa 1992)(drug offense).

The case is distinguishable from both *Cook* and *Kleidosty*. Unlike *Cook* the Claimant was unaware that he was in jeopardy of having his car impounded if he merely failed to wear a seatbelt. Unlike *Cook* the incarceration of the Claimant did not jeopardize his ability to do the job. Indeed the Claimant's incarceration and the impounding of the car had almost no effect on the Claimant's ability to carry out the Employer's business. Unlike *Kleidosty* the Employer had no specific policy that had been communicated to the Claimant which covered the situation. The Claimant had never been told that a single traffic infraction, like not wearing a seatbelt, could result in termination.

The case is more in line with *Fairfield Toyota v. Bruegge*, 449 N.W.2d 395 (Iowa App. 1989). In *Bruegge* the claimant road tested cars and was warned that due to his driving record he was in danger of losing insurance. When he swerved into a ditch to avoid a deer his insurability was lost along with his job. Yet the Court reversed a disqualification and found, as a matter of law, that since the claimant had made no intentional violation of the rules of the road following his warning then he did not engage in misconduct. Here the Claimant had had no warning at all concerning driving, and further it has not been shown that he *intentionally* failed to wear his seatbelt. Under *Bruegge* and the basic principles governing unemployment claims we conclude that the Employer has not proven disqualifying misconduct by the Claimant.

DECISION:

The administrative law judge's decision dated March 30, 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. 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/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 Kuester

RRA/fnv