

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**DUSTIN S BROWN**  
Claimant

**ASHER MOTOR COMPANY**  
Employer

**APPEAL 16A-UI-12032-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/16/16**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the November 2, 2016, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 28, 2016. The claimant participated personally. The employer participated through Greg Jones, general manager. Lester Cagle, service manager, also testified. Employer exhibits 1 and 2 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a service technician and was separated from employment on October 13, 2016, when he was fired for inability to perform his job and misrepresenting his qualifications.

The claimant was applied and interviewed for the position upon his father making contact with the employer, and the employer actively encouraging the claimant to apply and leave his prior employment. During the interview, the claimant was asked if he knew how to perform several routine jobs in the course of a service technician. The claimant stated he could. He also completed a job application which reflected he had experience as an auto technician in the Army and that he had studied auto mechanics at a technical school for two years (Employer exhibit 2).

The claimant was employed for approximately six or seven weeks before discharge. The employer reported that as early as the first week on the job, Mr. Cagle identified deficiencies and issues regarding the claimant's lack of knowledge. The employer reported the claimant was frequently consulting other technicians, and struggled with basic functions. The employer reported the claimant was issued verbal and written warnings, but had no details and no copies were furnished for the hearing. The claimant acknowledged he received a verbal warning in the last day or two of his employment. The final two incidents occurred in the last days of employment. The first occurred when the claimant failed to secure a radiator cap, causing a customer to have to return when the car was leaking fluids. The claimant then failed to identify the reason the car was leaking even though he had just worked on it. Then in a second incident, the claimant took eight hours to complete a two hour water pump service. The claimant was unable to perform work to the employer's satisfaction at any time during his employment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2268.00, since filing a claim with an effective date of October 16, 2016. The administrative record also establishes that the employer did participate in the November 1, 2016 fact-finding interview by way of Greg Jones, general manager.

#### **REASONINGS AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

#### **871—24.32 Discharge for misconduct.**

##### **24.32(1) Definition.**

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 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 definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Admin. Code r. 871-24.32(5) provides:

Discharge for misconduct.

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The credible evidence presented is that the claimant never performed work to the satisfaction of the employer during his short employment. The claimant was not dishonest in his application about his experience or schooling and in fact, was approached by the employer to consider employment.

The employer reported there were approximately a dozen incidents relating to the claimant's discharge, including two final incidents that occurred in short proximity of each other. In one incident, the claimant failed to secure a radiator cap, and failed to identify the cause of the leaking fluid when the customer returned the car. Understandably, the claimant's actions of causing possible damage to a vehicle could strain customer relations but no evidence was

presented by either party that the claimant willfully neglected his duties on the car or intentionally did not secure the cap before returning the vehicle to the customer. Then in a second incident, the claimant took nearly four times the allotted time to complete a water pump causing other customers delays. This too, could affect customer relations for the employer.

The employer asserted the claimant was often consulting his peers for assistance which is indicative that he was struggling to complete his job duties independently. The credible evidence presented is that the claimant was unable to perform work to the employer's satisfaction at any time during his employment and no credible evidence was presented that it was due to the claimant's willful or intentional actions. Since the employer agreed that the claimant had never had a sustained period of time during which he performed his job duties to employer's satisfaction and inasmuch as he did attempt to perform the job to the best of his ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

Because the claimant is eligible for benefits, the issues of overpayment and employer relief of charges are moot.

**DECISION:**

The November 2, 2016, (reference 03) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid unemployment insurance benefits. The employer's account is not relieved of charges.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs