IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

PETE B MOORE
4017 – 5TH AVE
DES MOINES IA 50313

MERRILL AXLE & WHEEL SERVICE INC
1403 – 1405 WALNUT
DES MOINES IA 50309-3417

Appeal Number: 05A-UI-01165-RT
OC: 01-02-05 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Merrill Axle & Wheel Service, Inc., filed a timely appeal from an unemployment insurance decision dated January 25, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Pete B. Moore. After due notice was issued, a telephone hearing was held on February 17, 2005 with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time mechanic from September 2002 until he was discharged on December 17, 2004. The claimant was discharged for an incident occurring the day before with the shop foreman, Dave Sereg. When the claimant had slack time in the shop and he was not working on other vehicles, he was working on a car which was actually a dune buggy. This was a large job taking several months and the claimant would work on that job when he had no other work to do. On December 15, 2004, the claimant was working on that car or dune buggy. The claimant was having to virtually rebuild the car without any plans and the owner was requiring the claimant to make significant modifications including a roll cage. The dune buggy was basically the claimant's own creation. The claimant was required to sit in the car at that stage of the work to verify that there was room for the modifications including a roll cage and to take measurements to see if the modifications would fit. This is what the claimant was doing when he was approached by Mr. Sereg. Mr. Sereg complained to the claimant that he was taking too long to do the job and took a pipe out of the claimant's hand and told the claimant that he would do the job himself. The claimant then began picking up his tools and pulling the other cars into the garage because it was 5:00, which was his usual time to clock out. The claimant clocked out at 5:00 and went home. The next day he was discharged. The only warning the claimant ever received was an oral warning approximately one year ago for taking an extended lunch. The claimant was doing his job to the best of his ability. Pursuant to his claim for unemployment insurance benefits filed effective January 2, 2005, the claimant has received unemployment insurance benefits in the amount of $644.00 as follows: $322.00 per week for two weeks, benefit weeks ending January 8 and January 15, 2005. The claimant became reemployed and, for benefit week ending January 22, 2005, he had earnings sufficient to cancel benefits for that week and the claimant has applied for no other benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code section 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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant credibly testified, and the administrative law judge concludes, that he was discharged on December 17, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of the claimant's duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that he was on some slack time meaning he did not have work on other vehicles and, therefore, was working on a large project on a vehicle or dune buggy. This project was taking several months. The claimant was having to make modifications requested by the owner and the dune buggy was basically the claimant's own creation. At the time in question, the claimant was sitting in the vehicle verifying that there was room for modifications, including a roll cage, and taking measurements. The claimant was in the process of doing that when he was approached by his supervisor, Dave Sereg, who complained to claimant that he was taking too long to do the work and Mr. Sereg took over for the claimant saying that he would finish the job. The claimant began picking up his tools, pulled the cars in the garage since it was near closing time and clocked out at 5:00, his usual time. The next day, December 17, 2004, he was discharged for this incident. The claimant was working to the best of his abilities and was not wasting time. The claimant had received no warnings or disciplines for this or similar behavior and the only warning or discipline he had ever received was an oral warning approximately one year earlier for taking an extended lunch. Under these circumstances, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's behavior was a deliberate act or omission constituting a material breach of his duties and/or evinced a willful or wanton disregard of the employer's interests and/or was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At most, the evidence shows that the claimant was working to the best of his abilities but this was unsatisfactory to the employer but mere inefficiency or unsatisfactory conduct is not disqualifying misconduct. Therefore, the

administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $644.00 since separating from the employer herein on or about December 17, 2004 and filing for such benefits effective January 2, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 25, 2005, reference 01, is affirmed. The claimant, Pete B. Moore, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

tjc/tjc