

**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**

**PHILLIP E FALKOSKI
3206 – 1ST ST
DES MOINES IA 50313-4420**

**OZARK AUTOMOTIVE DISTRIBUTORS INC
ATTN HUMAN RESOURCES
PO BOX 1156
SPRINGFIELD MO 65801-1156**

**Appeal Number: 06A-UI-06569-HT
OC: 05/28/06 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

STATEMENT OF THE CASE:

The employer, Ozark Automotive Distributors, Inc. (Ozark), filed an appeal from a decision dated June 19, 2006, reference 01. The decision allowed benefits to the claimant, Phillip Falkoski. After due notice was issued, a hearing was held by telephone conference call on July 18, 2006. The claimant participated on his own behalf. The employer participated by Human Resources Supervisor Whitney Smith.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Phillip Falkoski was employed by Ozark from November 11, 2002 until May 30, 2006. He was a full-time material handler.

The application the claimant filled out in 2002 asked whether he had ever been convicted of a crime and he checked "no," then scratched it out. He had been convicted of sexual assault on a minor in 1992.

In April 2006, the corporate assistants informed Human Resources Supervisor Whitney Smith that some employees claimed to have seen Mr. Falkoski's picture on a website of sex offenders. She looked through his file to review his application, then requested the corporate human resources department to check the website as she did not have access to it. On May 26, 2006, the corporate office informed her the website did show Mr. Falkoski as a sex offender and told her to meet with him and give him a chance to explain.

On May 30, 2006, Ms. Smith and Operations Manager Jerry Carson met with the claimant. He admitted he had marked "no" on the application, then scratched it out. His story was that he intended to talk to the human resources representative when and if he was called for an interview and reveal the information at that time. The Human Resources Supervisor at that time was Mary Leto and he alleged she only asked him when the conviction was and when he told her it was 1992, she said "not to worry about it" because the criminal background checks do not go back more than ten years.

The claimant was suspended pending further investigation. Ms. Smith and Mr. Carson contacted Ms. Leto who, although no longer employed by Ozark, was a friend of Mr. Carson's and still worked in the area. She did not have any specific recollection of Mr. Falkoski, but said she always followed policy regarding criminal conviction. The policy is if the box is marked "yes," the applicant is asked what the conviction was for. If it was for any activity relating to controlled substances or sexual crimes, they are rejected immediately. For any other crimes, they are asked to give permission for a criminal background check which is then sent to the corporate office to be initiated. When the check is done, the local facility will follow the directions of the corporate office as to whether the person should be hired.

After finishing the rest of the investigation, the claimant was summoned back to the office and discharged by Ms. Smith.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of his unemployment benefits.

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).

871 IAC 24.32(6) provides:

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The claimant was discharged for falsification of his work application. The judge notes he did intend to lie about his criminal conviction by putting "no" in answer to the pertinent question, however, he did scratch that answer out. Although he was not properly forthcoming and marked "yes" to the question, it would have been evident to anyone reviewing the application that the matter needed to be looked into more fully. The employer failed to do this for reasons which are unclear. The claimant's testimony is that he did tell Ms. Leto about the criminal conviction and she assured him that since it was more than ten years prior, the employer's background check would not go back that far. The employer has failed to present sufficient evidence or testimony to rebut this.

The claimant worked for the employer for over three years without, apparently, any problems. It was nothing related to any criminal activity which caused the employer to finally inquire more fully about the information on the application, although his personnel records were easily and fully accessible during this time. 871 IAC 24.32(8) requires there to be a current, final act of

misconduct and the employer has failed to establish this, as it could have reviewed the claimant's criminal background at any point.

The above Administrative Code section requires the falsification of the application to be willful. The claimant crossed out his dishonest answer and did not put in a more correct one. This may still be considered falsification by omission rather than commission, but the section further requires the falsification to endanger the health, safety or morals of the employer, the applicant or others or expose the employer to legal liabilities or penalties. The claimant does not appear to have been a danger to himself, co-workers or customers, and the administrative law judge cannot conclude the failure to reveal a criminal conviction under these circumstances meets the criteria for misconduct under the provisions of the above Administrative Code section. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Newman v. IDJS, 351 N.W.2d 806 (Iowa App. 1984).

The employer has failed to meet its burden of proof and disqualification may not be imposed.

DECISION:

The representative's decision of June 19, 2006, reference 01, is affirmed. Phillip Falkoski is qualified for benefits, provided he is otherwise eligible.

bgh/cs