

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**PATRICK A KENNEDY**  
Claimant

**APPEAL NO. 07A-UI-02138-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BOB BROWN CHEVROLET-GEO-ISUZU INC**  
Employer

**OC: 01-21-07 R: 02  
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 19, 2007, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on March 19, 2007. The claimant did participate along with his father, Phillip Kennedy. The employer did participate through Ron Christenson, Supervisor, and was represented by Rachel Thompson of TALX UC eXpress.

**ISSUE:**

Was the claimant discharged for work related misconduct?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a car detailer/cleaner full time beginning March 25, 2002 through January 25, 2007, when he was discharged. The employer cannot pinpoint any one single incident that led to the claimant's discharge. The claimant had a new supervisor, Mr. Christenson beginning in October 2006. A few months prior to his discharge, the claimant began working with another new employee, Steve Armstrong, who would on an almost daily basis tell the claimant that he was stupid and would use profanity when speaking to the claimant. Mr. Armstrong would call the claimant a "dumb motherfucker" on a daily basis. The claimant complained to Mr. Christenson about Mr. Armstrong's treatment of him. The claimant then began not to meet the employer's expectations. In early January he burned the paint on a car while removing a decal. The incident was an accident. Mr. Armstrong complained about the claimant using a chammie to clean wheel well on January 24. When he was discharged the claimant was told that it was due in part to his inability to get along with his coworkers, the same coworker who was using profanity and demeaning language when speaking to him on a daily basis. Mr. Christenson believed that the claimant could not meet the employer's expectations. The employer is unable to detail what specific actions the claimant engaged in prior to his discharge other than it taking him forty minutes to fuel a car and his lack of focus or wondering around. The claimant admits that his focus waned and was damaged when he was subjected to daily profanity and demeaning language from Mr. Armstrong.

**REASONING AND CONCLUSIONS OF LAW:**

The claimant was discharged due to allegations of not working fast and efficiently according to the employer's expectations. While Mr. Christenson says he verbally warned the claimant, he did not provide any warning in writing, nor does he know whether he followed the company handbook on imposing discipline. The claimant was told at one time in the fall of 2006 that he was being suspended, then was later told he was not being suspended. The claimant's job problems began when a new supervisor and another new employee, who harassed him, were brought in. The claimant performed the work to the best of his ability.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 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. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Inasmuch as he did attempt to perform the job to the best of his ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The abuse the claimant was subjected to by Mr. Armstrong, which he did complain about, is ample excuse for his lack of focus on the job when subjected to such language. Accordingly, no disqualification pursuant to Iowa Code section 96.5-2-a is imposed.

**DECISION:**

The February 19, 2007, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw