

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN L BOHR
Claimant

APPEAL NO. 07A-UI-05478-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LARRY'S PLUMBING & HEATING
Employer

OC: 04/29/07 R: 04
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Larry's Plumbing & Heating (employer) appealed a representative's May 21, 2007 decision (reference 02) that concluded Brian Bohr (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 14, 2007. The claimant participated personally. The employer participated by Larry Schultz, President.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on September 9, 1999, as a full-time technician. On or about March 30, 2007, employer heard rumors that the claimant was going to open a business in direct competition with the employer. The employer confronted the claimant and his brother. The claimant said that he would be quitting at some point in the future to open his own business but would not give the employer a date. On April 6, 2007, the employer again asked the claimant when he was going to quit to start his business. The claimant told the employer he was unsure of the date. The claimant discussed his new business with his brother, Chad Bohr, who also worked for the employer. The claimant told his brother that he would hire him to work for the new business and his brother agreed to come to work for him.

On April 12, 2007, the claimant told the employer he was going to take April 13, 2007, to make financial preparations for starting his business. The claimant would not give the employer any date certain for his last day. The employer told the claimant that April 12, 2007, would be his last day working. The employer gave the claimant vacation pay.

The claimant started his business on or about June 1, 2007, and he is actively self employed.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Although only preparing or making arrangements to enter into competition with one's employer does that employer no legally cognizable harm, soliciting fellow employees to leave their work in favor of a competitor breaches the employee's common law duty of loyalty. Porth v. Iowa Department of Job Service, 372 N.W.2d 269 (Iowa 1985). The claimant admitted to soliciting his co-worker, brother, to leave work in favor of a competitive company. The claimant was discharged for misconduct. Benefits are denied.

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 claimant has received benefits since filing his claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

The issue of the claimant's availability for work is remanded for determination.

DECISION:

The representative's May 21, 2007 decision (reference 02) is reversed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,097.00. The issue of the claimant's availability for work is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw