

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILLIP M GUSK
Claimant

APPEAL NO. 10A-UI-13255-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAMS RIVERSIDE AUTO PARTS INC
Employer

OC: 08/22/10
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Phillip Gusk, filed an appeal from a decision dated September 16, 2010, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on November 10, 2010. The claimant participated on his own behalf. The employer, Sam's Riverside Auto Parts, Inc. (Sam's), participated by Manager Kevin Brooks and General Manager Scott Frank.

ISSUE:

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

FINDINGS OF FACT:

Phillip Gusk was employed by Sam's from April 23, 2009 until August 24, 2010 as a full-time sales person. Mr. Gusk had complained about another employee, Jimmy Moon, for failing to do his job as lot boy adequately. He was lazy and insubordinate, and also related to another member of management, Vicky Moon.

On August 8, 2010, Mr. Gusk was with a customer and asked Jimmy to go get some keys for the vehicle the customer wanted to test drive. Jimmy told him the keys were in the key box and did not get them as requested although it was part of his job duties. The claimant went and got the keys and when the customer was out on the test drive said to Jimmy, "some day someone is going to bitch slap your ass and put you on the ground."

Manager Kevin Brooks was informed of the incident and questioned Mr. Gusk, who told him what he had said. Nothing happened until August 23, 2010, when Mr. Brooks questioned Jimmy and another employee, John. John stated he had heard the exchange but the claimant noted he had been too far away to hear anything. Later John told Mr. Brooks that the claimant had accused him of "ratting him out" to management, though Mr. Gusk also denied this when questioned. The decision was made to discharge the claimant and Mr. Brooks notified him of this on August 24, 2010.

REASONING AND CONCLUSIONS OF LAW:

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 to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case the claimant has denied issuing any threats of physical harm to Jimmy, only stating that he was going to get himself into trouble eventually due to his attitude. Both John and Jimmy are still employed by Sam's but did not testify.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

Additionally the employer was aware of the incident for one to two weeks before taking any action about it. The reason for the delay has not been adequately explained. But it does take the incident beyond a current, final act as required by 871 IAC 24.32(8) in order to impose a disqualification.

DECISION:

The representative's decision of September 16, 2010, reference 01, is reversed. Phillip Gusk is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css