

**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**

**NEIL B BARTELT  
1800 GRAND AVE APT 363  
WEST DES MOINES IA 50265-5056**

**K R JONES ENTERPRISES INC  
D/B/A CAR – X MUFFLER & BRAKE  
1400 NW 86<sup>TH</sup> ST  
DES MOINES IA 50325**

**ROBERT C OBERBILLIG  
ATTORNEY AT LAW  
DRAKE LEGAL CLINIC  
2400 UNIVERSITY AVE  
DES MOINES IA 50311**

**Appeal Number: 06A-UI-04620-RT  
OC: 03/19/06 R: 02  
Claimant: Appellant (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Neil B. Bartelt, filed a timely appeal from an unemployment insurance decision dated April 24, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 16, 2006, with the claimant participating. The claimant was represented by Robert C. Oberbillig, Attorney at Law. Kevin R. Jones, Owner and President, and Jason Scott Johnson, Store Manager at the employer's store on Merle Hay Drive in Des Moines, Iowa, where the claimant was employed, participated in the hearing for the employer, K R Jones Enterprises, Inc., doing business as Car-X Muffler & Brake. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. This appeal was consolidated with appeal number 06A-UI-04621-RT, for the purposes of the hearing with the

consent of the parties. At 4:29 p.m. on May 9, 2006, the administrative law judge spoke to the claimant's wife who requested the hearing be rescheduled to May 15 or 17, 2006. The administrative law judge explained that he was already scheduled for those days and the claimant's wife decided to leave the hearing as scheduled. Both the claimant and his attorney participated in the hearing and the claimant's wife sat in on the hearing but did not testify.

#### 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: The claimant was employed by the employer as a full-time automotive technician from October 30, 2000, until he was discharged on March 24, 2006. The claimant was discharged for dishonesty and theft. Sometime before March 23, 2006, the claimant made an arrangement with a customer to bring his car to the employer's shop and the claimant would charge the customer \$50.00 for the work payable to the employer and the balance of the cost of the work would be paid to the claimant "under the table." The customer called the claimant directly instead of the ordinary intake employee for the employer. The claimant informed Jason Scott Johnson, Store Manager at the employer's store on Merle Hay Drive in Des Moines, Iowa, that it was a car of a friend. However, Mr. Johnson specifically told the claimant that he had to do an estimate. When the car arrived, the claimant prepared an estimate in the amount of \$481.49. This included a discount that was reserved only for family of employees and the customer was not a family member of the claimant. When the customer later learned that he would have to pay \$481.49 he was mad and called and spoke to Mr. Johnson. The customer explained to Mr. Johnson the arrangements noted above that the customer had made with the claimant. When the customer realized that the claimant might be in trouble the customer went ahead and paid for the repairs as estimated with his credit card number given over the phone. All customers are supposed to meet first with Mr. Johnson but in this case the customer did not..

Mr. Johnson and the owner and president of the employer, Kevin R. Jones, one of the employer's witnesses, confronted the claimant on March 24, 2006. Mr. Jones explained to the claimant that Mr. Johnson had talked to the customer and that the customer had outlined the arrangements noted above. The claimant admitted to both that he had made such arrangements with the customer and was going to carry them out. In some fashion the claimant apologized and indicated that he wanted to keep his job. However, the employer at that time discharged the claimant.

At some point the claimant had indicated to the employer that he might possibly be moving but did not specify any particular dates and had not formally quit to move before he was discharged. The claimant had never done anything similar before and had never received any warnings or disciplines. The employer has policies that prohibit stealing but does not specifically define stealing. The employer believed that the arrangement made by the claimant with the customer was stealing. On March 28, 2006, the claimant called Mr. Jones and again confessed to this arrangement.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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).

About the only thing that the parties agree on is that the claimant was discharged on March 24, 2006, and the administrative law judge so concludes. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a close question, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The resolution of this issue depends upon the credibility of the witnesses.

The employer's two witnesses credibly testified that a customer informed them of an arrangement made with the claimant to do work on his vehicle and that the claimant would charge the customer only \$50.00 payable to the employer and the balance for the work would be paid to the claimant "under the table." Jason Scott Johnson, Store Manager of the employer's store on Merle Hay Drive in Des Moines, Iowa, credibly testified that the customer came in on March 23, 2006 and instead of immediately taking the vehicle to Mr. Johnson which was the common procedure, the customer went directly to the claimant. When Mr. Johnson observed this he told the claimant to do an estimate and thus spoiled the claimant's attempt.

The claimant did an estimate in the amount of \$481.49 which included discounts which were only for family of employees and the customer was not family of the employee. Mr. Johnson further credibly testified that the customer was angry when he received an invoice in the amount of the estimate, \$481.49 and called Mr. Johnson and told him of the arrangements with the claimant. Mr. Johnson and the employer's other witness, Kevin R. Jones, Owner and President, credibly testified that they confronted the claimant on March 24, 2006 and the claimant admitted to this arrangement.

The claimant testified otherwise claiming that he had never made any such arrangement with the customer and that the customer was only mad because the claimant had left off of the initial estimate a \$20.00 oil change. The claimant's testimony is not as credible as the testimony of the employer's two witnesses. The bottom line here is that two witnesses credibly testified that the claimant confessed the arrangement to them and only one witness, the claimant, denied such a confession. The administrative law judge is constrained to conclude here that the claimant did confess to the two employer's witnesses the arrangement with the customer and that the claimant had in fact made such an arrangement with the customer. All the witnesses do seem to agree that the customer called the employer and was angry. The administrative law judge does not understand why the customer would call the employer and be angry unless his arrangement with the claimant had been foiled. The claimant testified that the customer was angry only because his bill had been increased \$20.00 for an oil change. The administrative law judge does not believe that this increase in a bill would make the customer so angry as to call the employer and then fictionalize an account about an arrangement with the claimant especially when the customer was a friend of the claimant. It is also telling that the customer went ahead and paid the full amount of the invoice to protect the claimant. The employer's story holds together far better than does the claimant's version.

The administrative law judge concludes that the claimant's actions in making the arrangement with the customer and attempting to carry it out was an effort to steal from the employer which is prohibited by the employer's policies. The administrative law judge further concludes that such an arrangement and effort was a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

#### DECISION:

The representative's decision of April 24, 2006, reference 01, is affirmed. The claimant, Neil B. Bartelt, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct.

cs/pjs