**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

**EDWARD A FISCHELS**
**916 E SEERLY BLVD**
**CEDAR FALLS IA 50613**

**AIKEY AUTO SALVAGE INC**
**1524 INDEPENDENCE**
**CEDAR FALLS IA 50613-3220**

**Appeal Number: 04A-UI-10502-RT**
**OC: 08-29-04 R: 03**
**Claimant: Appellant (2)**

**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 for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Edward A. Fischels, filed a timely appeal from an unemployment insurance decision dated September 17, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on October 19, 2004 with the claimant participating. Jeanial Pilkey and Shane Ebaugh testified for the claimant. James Aikey, Owner, and Jeff Aikey, Manager, participated in the hearing for the employer, Aikey Auto Salvage, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 dismantler off and on for ten years until he was separated from his employment on August 20, 2004. The claimant received a one hour lunch and on August 20, 2004, the claimant had made plans with his girlfriend to meet with a realtor over his lunch hour. Earlier that day a customer, Jeanial Pilkey, one of the claimant's witnesses, had called the employer requesting a part for her vehicle. She went to the employer over her lunch time to obtain the part and it was not ready. Either James Aikey, Owner, or Jeff Aikey, Manager, the two employer's witnesses, told the claimant to work over his lunch period and obtain the part for Ms. Pilkey. The claimant explained that he could not because he had an appointment but did not give a specific reason. The claimant was then told either by James Aikey or Jeff Aikey that if he would not get the part then he should not bother coming back after lunch. The claimant believed he was discharged and left and did not return to work. The claimant had never received any warnings or disciplines while working for the employer. The claimant was not specifically told that he was fired or discharged. The claimant had never expressed any concerns to the employer about his working conditions nor had he ever indicated or announced an intention to quit if any problems he was having at work were not addressed by the employer.

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 not.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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).

The first issue to be resolved is the character of the separation. The employer maintains that the claimant left his employment voluntarily when he came up to Jeff Aikey, Manager and one of the employer's witnesses; and told him that he would not be coming back from lunch and then left for lunch and never returned. The claimant is equally adamant that he was discharged when either James Aikey, Owner, or Jeff Aikey, Manager, told the claimant not to bother coming back after lunch. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily. The claimant and his two witnesses, one of whom is especially impartial, Jeanial Pilkey, the customer in question, credibly testified that the claimant was asked by either James Aikey or Jeff Aikey to work over his lunch time and obtain a part for Ms. Pilkey. When the claimant indicated that he could not because he had an appointment, the claimant was told by either James Aikey or Jeff Aikey that he should not bother coming back to work after lunch. Ms. Pilkey was particularly credible because she was the customer who had come to the employer's location to get a part and the part was not ready and observed the exchange. The claimant's testimony was also confirmed by a co-worker, Shane Ebaugh. The testimony of the claimant and his witnesses was credible. James Aikey testified that he was not present. Jeff Aikey denies any such occurrence testifying that he did not remember it. The testimony of James Aikey and Jeff Aikey are less credible than that of the claimant and his witnesses. Accordingly, the administrative law judge concludes that the claimant did not voluntarily leave his employment but was discharged or at least justifiably believed that he was discharged on August 20, 2004. The issue then becomes whether the claimant was discharged for disqualifying misconduct.

It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only evidence of misconduct on the part of the claimant was his refusal to work during his lunch hour to obtain a part for a customer. The evidence establishes that the claimant was entitled to a one hour lunch and that he had made arrangements with his girlfriend to meet a realtor over the lunch period and could not work over the lunch period. The claimant so indicated this to the employer. Rather than find someone else to obtain the part or wait until the claimant returned from lunch, the employer told the claimant not to bother coming back. The administrative law judge must conclude on the evidence here that the claimant's refusal to work over the lunch period under these

circumstances was not a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor did it evince a willful or wanton disregard of the employer's interests nor was it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. There was no other evidence of other acts on the part of the claimant giving rise to his discharge nor was there any evidence of prior warnings or disciplines. The evidence does indicate that the customer, Ms. Pilkey, had to return at approximately 4:30 p.m. that day and get her part. It would have been very possible then for the claimant to have gone to his lunch appointment and returned and obtained the part for Ms. Pilkey prior to her coming at 4:30 p.m. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of September 17, 2004, reference 01, is reversed. The claimant, Edward A. Fischels, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

tjc/b