

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL FRANK
Claimant

APPEAL NO. 11A-UI-05888-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAUER BUILT INC
Employer

OC: 04-03-11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 28, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 31, 2011 and June 10, 2011. The claimant participated in the hearing. James Gardiner, store manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time service technician for Bauer Built Tire Center from July 7, 2008 to April 7, 2011. He was discharged for poor work performance with a final incident that occurred April 7, 2011. At the beginning of the week, the claimant was assigned to work on a vehicle that had a rattle on the front end and he replaced a bearing. The customer returned April 7, 2011, with the same rattle and the shop foreman looked at the car and found the rattle was the result of worn out sway bar bushings. The claimant should have checked everything and if he had, he would have found that the sway bar bushings were worn, but he only looked at the bearing. The claimant received a written warning in September 2010 for poor performance and the employer issued him another written warning February 9, 2011, for substandard work done on a car January 28, 2011. The claimant put on a timing belt, but the car did not run properly when it left. The employer told the customer to take the car to a dealership and the dealership found the engine cam was off 180 degrees. The dealership had to replace the spark plugs because the cam was out of time and it cost the employer \$1,000.00. The customer brought the car back again February 15, 2010, and complained about the engine running low on power. The employer determined the claimant's previous error caused the raw fuel to have gone through the engine rather than being burned, which caused the catalytic converter to fail. The customer no longer wanted the car, so the employer had to go through its insurance company to cover the loss. The claimant received a final written warning March 16, 2010, because the total loss on the car was approximately \$4,000.00. The employer had to refund the

\$630.00 for the original repair and the cost of the car was approximately \$3,400.00. The warning provided that any further incidents would result in further disciplinary action up to and including termination. During the claimant's final week of employment, he refused to complete a tire repair April 6, 2011, when the employer was gone and another employee had to be pulled off a different job so the tire repair job could be completed. When the customer returned its car April 7, 2011, due to the continued rattle from the sway bar bushings, the employer decided it could no longer afford to keep the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). The claimant was discharged April 7, 2011, for poor work performance. Misconduct connotes volition. A failure in

job performance which results from inability or incapacity is not volitional and therefore, not misconduct. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979). When 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. Iowa Department of Job Service, 386 N.W.2d 552 (Iowa App. 1986). The evidence demonstrates the claimant did not meet the employer's expectations but there is no evidence of any wrongful intent. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. Id. While the claimant did make significant errors that cost the employer time and money and he agrees there were jobs he took that he should not have taken because he was not experienced enough to do them properly, the claimant's mistakes were not intentional but, rather, due to inexperience and a lack of understanding of what was required to execute the work correctly. Consequently, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The April 28, 2011, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw