

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SPENCER J BIRKENHOLZ
Claimant

APPEAL NO: 08A-UI-05911-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAN KRUSE PONTIAC INC
Employer

**OC: 05/18/08 R: 04
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Spencer J. Birkenholz (claimant) appealed a representative's June 17, 2008 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Dan Kruse Pontiac, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 14, 2008. The claimant did not call in prior to the scheduled hearing, but called the Appeals Section while the employer was on the phone. When the claimant was called by the administrative law judge, the call went to the claimant's voice mail. A message was left for the claimant to contact the Appeals Section immediately. Gwen Wilson and Matt Warthan, the sales manager, appeared on the employer's behalf.

After the hearing had been closed and the employer had been excused, the claimant contacted the Appeals Section. He made a request to have the hearing reopened. Based on the claimant's request to reopen the hearing, the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is there good cause to reopen the hearing?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 1, 2008. The employer hired the claimant to work as a full-time sales person. Warthan supervised the claimant. The claimant began working about the same time as another person. The claimant and this person developed a friendship outside of work.

On May 13, the employer concluded the other employee took \$5,000.00 of the employer's money. There were rumors the employer was going to discharge the other person. The

claimant did not believe the other employee had anything to do with the missing \$5,000.00. The claimant defended his friend and did not want his friend discharged. The claimant made comments that he would quit if the employer discharged his friend.

On May 13, the owner, Doug Warthan discharged the claimant for creating dissension at work by indicating he would quit if the employer discharged his friend. Prior to discharging him, the employer did not tell the claimant to stop making the remarks that the employer discharged him for making. Prior to May 13, Matt Warthan talked to the claimant about other issues, but the claimant was not discharged for previously discussed issues.

Prior to the hearing, the claimant did not contact the Appeals Section to provide his phone number. Shortly after 8:00 a.m., the claimant used a friend's cell phone and contacted the Appeals Section. The claimant gave his cell phone number to call his so he could participate in the hearing. This number was called, but the claimant's cell phone was not charged and the call went immediately to voice mail. The claimant did not call the Appeals Section again until 9:30 a.m. When the claimant called a second time, the hearing had been closed and the employer had been excused from the hearing. The claimant requested that the hearing be reopened.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c). Even though the claimant called the Appeals Section during the hearing, he provided his cell phone number and it was not charged. As a result, the claimant was not available for the hearing. Additionally, the claimant did not contact the Appeals Section again for over 90 minutes. Under these facts, the claimant did not establish good cause to reopen the hearing.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established business reasons for discharging the claimant. The facts do not, however, establish that the claimant intentionally disregarded the standard of behavior the employer had a right to expect from him. The claimant may have used poor judgment when he made comments about quitting, but he did not commit work-connected misconduct. As of May 18, 2008, the claimant is qualified to receive benefits.

The employer is not one of the claimant's base period employers. During the claimant's current benefit year, the employer's account will not be charged.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's June 17, 2008 decision (reference 01) is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of May 18, 2008, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account will not be charged during the claimant's current benefit year.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs