

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD S MAREK
Claimant

APPEAL NO. 07A-UI-06663-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PDQ HOIST & TOOL REPAIRS INC
Employer

OC: 06/10/07 R: 02
Claimant: Respondent (2)

Section 96.5-2 a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

PDQ Hoist & Tool Repairs, Inc. (employer) appealed a representative's July 2, 2007 decision (reference 01) that concluded Donald S. Marek (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for reasons that did not constitute a current act of work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 9, 2007. The claimant participated in the hearing. Steve Newlander, attorney at law, appeared on the employer's behalf. Steve Megee, the president, testified on the employer's behalf. During the hearing, Employer Exhibits One through Seven were offered and admitted as evidence. Based on 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:

Did the employer discharge the claimant for a current act of work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on October 16, 2002. The claimant worked full time as the plant manager. MeGee supervised the claimant.

During the course of his employment, the claimant decided he wanted to either buy the employer's business or start his own business. On November 15, 2006, the claimant registered his incorporated business, DSM Hoist, Inc., with the Secretary of State of Iowa. (Employer Exhibit 4.) The claimant's business was the same as the employer's business.

In December 2006, the employer learned the claimant used the employer's credit card for personal purchases. (Employer Exhibit One.) The employer talked to the claimant about this and the claimant did not do this again. Prior to December 2006, the employer discovered the

claimant wrote out child support checks that the employer's representative signed. This resulted in the employer paying over \$2,000.00 more in child support than had been taken out of the claimant's salary. After the employer discovered this overpayment, the claimant made payments to pay back the employer. (Employer Exhibit Six.)

Although the claimant was not happy and wanted to start his own business, the employer did not have or know about any further problems until May 2007. In early May, the employer learned the claimant had completed his first job for his business, DSM Hoist, Inc. The job was at one of the employer's customers. The claimant provided services to this customer under his business name because he had been upset with the employer. The customer had no idea what the claimant was doing, because the claimant never billed the customer for the services he performed. The claimant did not tell the employer to bill the customer for services the claimant performed at this business either. When the claimant completed the inspection at the employer's customer's facility, he used the employer's inspection form and just changed the letterhead to reflect the claimant's business name instead of the employer's business name. (Employer Exhibits Two and Five.)

While investigating to find out how many customers the claimant had performed services for under his business, the employer also learned the claimant used the employer's computer on Saturday and Sunday when no one was in the building. The computer records indicate the claimant visited pornographic web sites during the weekend. (Employer Exhibit Seven.) The claimant even downloaded these files. In late May or early June, the employer knew about the claimant's Internet activity and went to work unexpectedly on a Saturday. Megee saw the claimant in a compromising situation when he arrived at work unexpectedly.

The employer did not say anything to the claimant after learning about his business that competed with the employer, that the employer knew claimant inspected the employer's customer's equipment as DSM Hoist, Inc., instead of the employer's business, and how the claimant used the employer's Internet inappropriately during the weekends. Since the claimant was the plant manager, the employer did not discharge him until the employer found and hired another plant manager. On June 15, 2007, the employer informed the claimant he was discharged because he was in competition with the employer and used the employer's computers and Internet inappropriately.

Since the June 15 discharge, the claimant works about 30 hours a week at his business. The claimant is also looking for a full-time job. The claimant established a claim for unemployment insurance benefits during the weeks of June 10, 2007. The claimant filed claims for the weeks ending June 23 through July 21, 2007. The claimant received a total of \$1,670.00 in benefits for these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. 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).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 AC 24.32(8).

Problems with the claimant's child support payment and his use of the employer's credit card for personal business were resolved by January 2007. There were no further problems of a similar nature. Even though the employer considered these factors when discharging the claimant, these problems do not constitute a current act.

By mid-May, the employer knew the claimant performed an inspection for one of the employer's customers under his business instead of the employer's business. Since the employer did not say anything about this to the claimant or advise him at that time his job was in jeopardy, this cannot be construed as a current act of misconduct. As a result of investigating the claimant's computer, the employer learned in late May about the claimant's inappropriate use of the employer's Internet during weekends. The claimant acknowledged he would not allow any employee to use a computer or Internet as he had done on weekends. The claimant's inappropriate use of the employer's computer and Internet, in addition to the compromising situation he found himself in when Megee unexpectedly came to work in early June on a Saturday, amounts to an intentional and substantial disregard of the standard of behavior the employer has a right to expect from an employee. This conduct constitutes a current act of work-connected misconduct. Therefore, as of June 10, 2007, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending June 23 through July 21, 2007. The claimant has been overpaid \$1,670.00 in benefits he received for these weeks.

DECISION:

The representative's July 2, 2007 decision (reference 01) is reversed. The employer discharged the claimant for reasons that constitute a current act of work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of June 10, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits for the weeks ending June 23 through July 21, 2007. The claimant has been overpaid and must repay a total of \$1,670.00 in benefits he received for these weeks.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw