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

TODD R KRAMER
1812½ IOWA
DAVENPORT IA 52803

QUAD CITIES AUTOMATIC POOLS INC
1021 STATE ST
BETTENDORF IA 52722-4855

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Appeal Number: 04A-UI-10111-RT
OC: 08-15-04 R: 04
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, 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

STATEMENT OF THE CASE:

The claimant, Todd R. Kramer, filed a timely appeal from an unemployment insurance decision dated September 8, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on November 9, 2004, with the claimant participating. The claimant was represented by David R. Treimer, Attorney at Law. Patrick S. Pieczynski, Pool Builder, was called by the claimant to testify. Jim Ketelsen, Manager, participated in the hearing for the employer, Quad Cities Automatic Pools, Inc. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

An initial hearing was held in this matter on October 11, 2004 without the claimant's participation. At that time the claimant had not called in a telephone number where he or any of his witnesses could be reached for the hearing and there was no record of the claimant's attorney. The hearing began when the record was opened at 9:02 a.m. and ended when the

record was closed at 9:14 a.m. The claimant called the administrative law judge at 3:47 p.m. and stated that he had not received a notice for the hearing and that he had an attorney. The administrative law judge determined to reopen the record and reschedule the hearing. An order to that effect was prepared by the administrative law judge, dated October 18, 2004, and sent to the parties and the claimant's attorney. By this reference, the order is incorporated herein as if fully and completely set forth.

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 job foreman on the pool crew from May 15, 2000 until he was discharged on August 17, 2004. The claimant was discharged for taking the employer's vehicle home on the nights of August 14 and 15, 2004, in disobedience to prior instructions and warnings. On August 14, 2004, the claimant was sent out to repair a pool in Parkview, Iowa, 15 miles from the employer's main location in the Quad Cities or Bettendorf, Iowa. Employees generally work on Saturdays. When they do, they are expected to punch in when they begin work and return to the employer's location and punch out. The claimant did so on August 14, 2004. However, the claimant then took the employer's vehicle home that night because he had to go back to the pool in Parkview, Iowa on Sunday and work on it. The claimant did so on Sunday, but by himself. The claimant then took the vehicle home with him and returned it when he went to work on August 16, 2004. The employer did not learn of the claimant's taking the vehicle home until later, on August 16, 2004, and the claimant was then discharged on August 17, 2004. The claimant did not punch in and out on Sunday, August 15, 2004. Employees do not work on Sundays but the claimant did so on this occasion because he wanted to fix the pool as quickly as possible and was unable to complete the work on Saturday, August 14, 2004. The claimant had no authorization from the employer to work on Sunday, August 15, 2004, nor did he have authorization to take the employer's vehicle home with him. The vehicle the claimant took home with him and that he usually operated was a truck generally assigned to the claimant, but it was the employer's vehicle. It was more convenient for the claimant to take the vehicle home with him than to return it to the employer. The claimant has to take a cab to and from work when working in the Quad Cities, and does so when he is working in the Quad Cities during the week.

On July 29, 2004, the claimant received a warning for taking the employer's vehicle home with him on the weekend of July 24 and 25, 2004. On August 2, 2004, the claimant received a second warning for taking the employer's vehicle home on the weekend of July 31, 2004 and August 1, 2004. Approximately one week prior to July 29, 2004, the claimant had also been given an oral warning by the owner, Keith Hall, for the same thing. Prior to being assigned to repair the pool in Parkview, Iowa, the claimant had been working in Cedar Rapids, Iowa. When working out of town and the employees stay at a motel, they do drive the vehicle to the motel instead of returning it all the way to the Quad Cities.

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).

The parties testified, and the administrative law judge concludes, that the claimant was discharged on August 17, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. 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 testimony of the parties is remarkably similar. On the weekend of August 14 and 15, 2004, the claimant took the employer's vehicle, which vehicle he was usually assigned, home with him each evening. This was contrary to the employer's instructions and warnings received by the claimant. The claimant did so because of convenience. The claimant was assigned to repair a pool in Parkview, Iowa, 15 miles from the Quad Cities where the claimant resided. On Saturday, August 14, 2004, the claimant went to the employer's location, punched in on the time clock as was required by the employer, took the vehicle to Parkview, Iowa, worked on the pool and then returned to the employer's location in the Quad Cities and punched out; he then took the vehicle home with him. The next day, a Sunday, August 15, 2004, the claimant took the vehicle back to Parkview, finished repairing the pool, took it home with him again, and then returned it to work on August 16, 2004. The claimant had received three prior warnings for taking the employer's vehicle home. The first

occurred approximately one week before July 29, 2004, when he was given an oral warning by the owner, Keith Hall. Thereafter, the claimant received two warnings; one on July 29, 2004, for taking the employer's vehicle on the weekend of July 24 and 25, 2004, and a second on August 2, 2004, for taking the employer's vehicle home on the weekend of July 31, 2004 and August 1, 2004. Whether the last two warnings were oral or written is not certain, but what is clear is that the claimant was given specific warnings on those two occasions about taking the employer's vehicle home. However, the claimant did not think the warnings were a "big deal" and "blew it off." The claimant did not remember the oral warnings from Keith Hall, but the administrative law judge concludes that such an oral warning was administered.

The administrative law judge is constrained to conclude on the record here that the claimant's persistence in taking the employer's vehicle home with him, against the employer's instructions and against the warnings set out above and in the Findings of Fact, was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinced a willful or wanton disregard of an employer's interest and, at the very least, was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant clearly received warnings about taking the employer's vehicle home with him. Nevertheless, the claimant persisted in doing so. There was some evidence offered that when working out of town, for example in Cedar Rapids, that the claimant and other employees could take the employer's vehicles to the motel where they were staying. This may be true, but the incident in question that triggered the claimant's discharge was a repair job in Parkview, Iowa, only 15 miles from the Quad Cities and the employer's location. The claimant even agreed that he came to work on Saturday, August 14, 2004 and punched in and then returned to the employer's location that evening and punched out. When the claimant was already at the employer's location, the claimant could have just left the employer's vehicle there and went home. The claimant did not because it was more convenient for him to take the employer's vehicle home. The claimant would have had to have taken a cab home. However, during the week when the claimant worked in the Quad Cities, he would take a cab to and from work. The administrative law judge believes that the claimant should have done so on August 14, and 15, 2004. The evidence also establishes that although the claimant may have worked on Sunday, August 15, 2004, he did not have to do so; and even if he did, he could have gone back to the employer's location, took the truck, went back out to Parkview, Iowa, finished the work, and then returned the truck on Sunday. The claimant did not do this, despite the prior warnings. The administrative law judge notes the claimant did not give much credence to the employer's warnings, thinking it was not a "big deal" and he "blew it off." However, the administrative law judge believes that these warnings were serious or they would not have been issued. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant's action in taking the employer's vehicle home on August 14 and 15, 2004, was disqualifying misconduct. Therefore, 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 dated September 8, 2004, reference 01, is affirmed. The claimant, Todd R. Kramer, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

b/b