

**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**

**BARRY KOELKER  
807 THIRD ST NW  
DYERSVILLE IA 52040**

**DAIRY LAB SERVICES INC  
5105 WOLFF RD  
DUBUQUE IA 52002-2560**

**TODD LOWKER  
ATTORNEY AT LAW  
PO BOX 7  
FARLEY IA 52046**

**Appeal Number: 06A-UI-00857-ET  
OC: 12-18-05 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, 4<sup>th</sup> 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/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 11, 2006, 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 February 7, 2006, and continued on March 2, 2006. The claimant participated in the hearing with Attorney Todd Lowker. Terry Hopper, General Manager and Scott Petsche, Chief Financial Officer, participated in the hearing on behalf of the employer. Employer's Exhibits A through N were admitted into evidence.

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 meter center technician/computer support for Dairy Lab

Services from December 1998 to December 21, 2005. The employer was concerned about the claimant's job performance and was taking steps in preparation of giving him a written warning. The claimant did not work December 16, 2005. A client called Mr. Hopper to check on a part and indicated he needed it as soon as possible so Mr. Hopper looked up the purchase order and discovered the order was not placed and the parts were not on backorder as the claimant told both Mr. Hopper and the client. Mr. Hopper checked the claimant's desk for the paperwork and while doing so he found several documents titled "Koelker Feed and Forage Lab" (KFFL). He asked CFO Scott Petsche whether the claimant had talked to him about having his own business and Mr. Petsche indicated he had not. The employer checked the Secretary of State's website and found a business registered to the claimant, which Mr. Hopper believed might be contributing to the claimant's poor work performance. Mr. Hopper and the technology manager searched the claimant's employer-provided work computer to see if he was working on tasks for his own business while on the employer's time and found e-mails, instant messages, several logos, a history of visits to the KFFL website, "correspondence to some of (the employer's) employees asking them to distribute brochures to their dairy producers, KFFL budget, feed and forage analyses forms, etc." as well as handwritten copies of potential clients in the surrounding area (Employer's Exhibit E, G, H-2, I, J, K, L, M and N). The employer was also aware the claimant had started to carry a second cell phone. He told Mr. Hopper it was in case his "wife or daycare provider needed to call him about his kids" but his business website listed a cell phone number so the employer believed "that he carried it with him even when he was working at DLS so that he could take calls for his own business during DLS work hours" because "he would frequently put his telephone extension in "do not disturb" mode and kept the meter center door shut" and was "neglecting his job duties to attend to his own business matters" (Employer's Exhibit H-2). Under the employer's policy an employee may engage in outside employment as long as the other job does not interfere with DLS work. The policy also states that company property is for DLS use only; internet access is intended for work-related business and access should not be abused; and the employer has the right to monitor computer usage (Employer's Exhibit A). After reviewing the situation, and considering the claimant's job performance, the employer terminated the claimant's employment.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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 employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant started his own business while still working for the employer. The employer was concerned about the claimant's job performance prior to learning he started another business and although some activity might have been acceptable, the evidence demonstrates the claimant used the employer's time and resources to start his business and get it up and running. The claimant argues he should have been given a warning and generally that is true. In this case, however, the claimant's activities interfered with the job he was being paid for and had been going on for several months. The claimant's actions were not isolated incidents but rather a daily, ongoing, pattern of behavior and his conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

DECISION:

The January 11, 2006, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

je/tjc