

**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**

**RICHARD R GRUBBS  
3004 W 2<sup>ND</sup>  
DAVENPORT IA 52804**

**LUJACK SCHIERBROCK  
CHEVROLET COMPANY  
3700 HARRISON ST  
DAVENPORT IA 52806**

**Appeal Number: 04A-UI-10977-RT  
OC: 09-12-04 R: 04  
Claimant: Respondent (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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, Lujack Schierbrock Chevrolet Company, filed a timely appeal from an unemployment insurance decision dated September 30, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Richard R. Grubbs. After due notice was issued, a telephone hearing was held on November 2, 2004, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witness 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 porter from January 2, 2003 until he was discharged on August 9, 2004. The claimant was first suspended on or about August 4, 2004 and then discharged on August 9, 2004. The claimant was suspended and then discharged for the loss of gas tickets. After a vehicle has been prepped and generally before it is cleaned the employer puts five gallons of gas in each vehicle. The claimant is usually the one who takes the vehicle to the gas station. In order to obtain gas, the claimant fills out a gas slip or ticket and signs the same authorizing the gas station to put five gallons of gas in the vehicle. Sometime in July 2004, the claimant had three Saturn vehicles done and ready for gas. He filled out the gas slips, signed them specifying that the vehicles were Saturns, and placed them on the dash of the three vehicles as was his custom. The vehicles were locked and the claimant unlocked the doors, placed the gas tickets on the dashboard of the vehicles and then closed the doors and locked them. The claimant is responsible for the gas tickets. Later the sales manager asked the claimant if the three cars were done. The claimant explained that they needed cleaning and he had not yet had an opportunity to put gas in them. The sales manager told him not to worry about the gas, that he would have the salesman put the gas in the vehicles. Usually the gas is put in the vehicles before the cleaning but the claimant was busy and unable to get to them at that time.

Three days later the claimant asked the sales manager if the vehicles had been completed and he asked about the gas slips. The sales manager said that one vehicle was completed but that there was no gas slip in the vehicle. The claimant checked that vehicle and the other vehicles and found no gas slips. The claimant asked the sales manager to keep his eyes open for the other two Saturn vehicles that should have gas slips on the dash. Approximately one week later the claimant was informed by the general manager that the gas station that sells gas to the employer called and indicated that someone had obtained gas for a vehicle other than a Saturn although the ticket specified a Saturn vehicle. The gas ticket that the claimant prepares sets out the type of vehicle. Because the vehicle was different from a Saturn, the gas station called the employer. The gas ticket did have the claimant's name on it. However, the claimant had not signed the receipt. Whenever gas is obtained, the person who puts the gas in the vehicle signs a receipt. This receipt was signed by another co-worker and not the claimant. The claimant did not give the gas ticket to the co-worker nor did he give gas tickets to any one for personal use and he did not, himself, personally use the gas tickets. Nevertheless, the next day he was suspended and then after five days, he was discharged. The claimant did not know if the other gas slips were found. There was no other reason given to the claimant for his suspension or discharge. Pursuant to his claim for unemployment insurance benefits filed effective September 12, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,911.00 as follows: \$273.00 per week for seven weeks from benefit week ending September 18, 2004 to benefit week ending October 30, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 claimant testified, and the administrative law judge concludes, that he was discharged on August 9, 2004 after being suspended on August 4, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge or suspension, the claimant must have been discharged or suspended for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence to such a degree of recurrence so as to establish disqualifying misconduct. The claimant credibly testified that he was suspended and then discharged because he lost gas tickets and in particular when he put three gas tickets into three Saturn

vehicles. The claimant testified that he put the gas tickets on the dash of each Saturn vehicle as was his custom. The claimant testified that the vehicle doors are locked and that he unlocked them to place the gas tickets on the dash and then re-locked the vehicles.

Eventually one of these gas tickets was used at the gas station where the employer fills the vehicles and provides the gas station with the gas tickets. However, the vehicle used to get gas was not a Saturn but the gas ticket offered to the gas station was signed by the claimant. The claimant did not sign the receipt; a co-worker signed the receipt. There is no evidence that the claimant gave any gas tickets to co-workers or gave the gas tickets to anyone or even used the gas tickets himself. In fact the claimant denies that he ever gave tickets to anyone or used them himself for personal reasons. Nevertheless, the claimant was suspended and then discharged.

On the evidence in the record here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant misappropriated any gas tickets that he prepared nor is there a preponderance of the evidence that any of his actions giving rise to his suspension and discharge were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that they evince a willful or wanton disregard of the employer's interests or that they are carelessness or negligence in such a degree of recurrence as to be misconduct. At most, the claimant's behavior was ordinary negligence in an isolated instance or a good faith error in judgment and is not disqualifying misconduct. The claimant credibly testified that although he usually puts gas in the vehicles before they are cleaned; on the day in question he did not have time to do so. When he informed the sales manager of this, the sales manager stated that he would take care of putting gas in the vehicles. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,911.00 since being suspended by his employer on August 4, 2004 and being discharged on August 9, 2004 and filing for such benefits effective September 12, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of September 30, 2004, reference 01, is affirmed. The claimant, Richard R. Grubbs, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

pjs/pjs