

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DWIGHT A KASKA
Claimant

APPEAL NO. 10A-UI-12684-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHANER OPERATING CORP
Employer

**Original Claim: 02/28/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated August 31, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on October 25, 2010. The claimant participated personally. Participating on behalf of the claimant was Mr. Tom Hobart, attorney at law. The employer participated by Mr. Tom Kuiper, hearing representative, and witnesses Brian Chapman, general manager, and Gladys Reif, former general manager/current consultant.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Dwight Kaska was employed by Shaner Operating Corporation, doing business as Des Moines Savery Hotel, from October 12, 1998, until July 28, 2010, when he was discharged from employment. Mr. Kaska held the position of full-time chief engineer and was paid by salary. His immediate supervisor was the general manager, Brian Chapman.

Mr. Kaska was discharged based upon the employer's belief that he had engaged in unacceptable conduct by harassing employees and using obscene language on the evening of Saturday, July 10, 2010. On that date, Mr. Kaska had been called to the hotel during evening hours to open plugged kitchen drains. Chef Chris Gatten had reported that Mr. Kaska was angry and that Mr. Kaska had directed inappropriate language at Mr. Gatten.

The blocked drains had been reported to Ms. Reif by telephone. A report that Mr. Kaska had acted inappropriately had also been reported to Ms. Reif by telephone. When Ms. Reif spoke to Mr. Kaska by telephone that evening, the claimant indicated that the problem had been fixed but also indicated some displeasure because he had to report on a Saturday night because of clogged drains that could have been avoided. Mr. Kaska had then later called Ms. Reif,

inquiring if everything was “okay.” When questioned about the matter, Mr. Kaska denied being unreasonably upset or directing inappropriate language to the chef or any other individuals.

Because the claimant had been counseled on a number of occasions by Ms. Reif in the past about his demeanor, the employer considered the complaints about Mr. Kaska to be credible and a decision was made to terminate the claimant from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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 upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this case, Mr. Kaska testified under oath that he did not become unreasonably upset or direct vile or obscene language to other employees on the evening of July 10, 2010. The claimant testified that although he was unhappy with the requirement that he report to the facility to clear up clogged drains that could have been avoided, he did not act unreasonably in doing so. In contrast, the employer has relied primarily on hearsay evidence. While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. The administrative law judge finds the claimant to be a credible witness and finds that his testimony is not inherently improbable. The administrative law judge thus concludes that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct on the part of the claimant.

It is also noted that although the employer was aware of allegations of misconduct on July 10, 2010, the employer did not act to discharge the claimant until 18 days later on July 28, 2010. During the interim, the claimant was allowed to continue to perform his duties and was paid by the company. The administrative law judge thus concludes that there was not a current act of misconduct at the time of the claimant's separation from employment on July 28, 2010. Benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated August 31, 2010, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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