

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY W KAEHN
Claimant

APPEAL NO. 09A-UI-05189-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HUISENGA CONSTRUCTION CO
Employer

OC: 01/11/09
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Timothy Kaehn, filed an appeal from a decision dated March 24, 2009, reference 06. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on April 29, 2009. The claimant participated on his own behalf and was represented by Michael Cross. The employer, Huisenga Construction Company (Huisenga), participated by Owner Dennis Huisenga and was represented by Art Cady.

ISSUE:

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

FINDINGS OF FACT:

Timothy Kaehn was employed by Huisenga from April 2009 until February 11, 2009 as a full-time laborer. The claimant was suspended for a week some time in either October or November 2008 for drinking. He was in the company van being driven home from the work site by another employee and consumed at least two cans of beer.

On February 11, 2009, the claimant and other employees were on a job site, which was a private home. Owner Dennis Huisenga was at the job site earlier in the day and allegedly found the claimant drinking beer, but did nothing. He later appeared at the site around 1:00 p.m. and found the claimant in the basement of the home on the couch. The employer asserted Mr. Kaehn was asleep or “passed out” and the claimant maintains he was only warming up as everyone on the crew did because the weather was so cold. Mr. Huisenga maintained he had seen the claimant drinking beer earlier in the day and the claimant denied he had had anything to drink at all in several months.

The employer believed the claimant had been drinking but he denied it. An argument ensued during which Mr. Kaehn called Mr. Huisenga an “asshole” and a “stupid son of a bitch.” He was discharged at that time. The claimant admitted to using abusive language to the employer but

only after he had been fired because Mr. Huisenga was angry he had filed for, and received, unemployment benefits during a one-week period in January 2009.

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge does not find either of the parties in this case to be very credible. The claimant's assertion he was fired for having filed unemployment benefits is suspicious because construction company employees file for unemployment benefits during bad weather very frequently. The employer's assertion the claimant continued to drink during company time in the company van after the November 2008 suspension is also suspect. If it was a chronic problem Mr. Kaehn should have been discharged for the first incident after the suspension. It is especially problematic that he was not discharged the morning of February 11, 2009, when the employer allegedly witnessed him drinking. Instead it occurred later in the day with no actual evidence of him being intoxicated.

The claimant and employer both agreed Mr. Kaehn used abusive language to Mr. Huisenga, but it is unclear whether this occurred before, during or after he was discharged. It is also not clear whether this was a one-time occurrence or if bad language was commonly used in this work environment. The administrative law judge does not find this to be a significant factor in the discharge as the employer had already decided to discharge the claimant before any of the comments were made.

Nonetheless, the employer has the burden of proof for discharged cases. There were other employees present at the time the employer found the claimant on the couch at the work site. The employer did not provide testimony from this other witness although he is still employed by Huisenga Construction. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety* 240 N.W.2d 682 (Iowa 1976). The judge cannot find one party more credible than the other. The evidence being equal it must be concluded the employer has failed to meet its burden of proof and disqualification may not be imposed.

DECISION:

The representative's decision of March 24, 2009, reference 06, is reversed. Timothy Kaehn is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css