

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES H RUBY
Claimant

APPEAL NO. 07A-UI-04641-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRIORITY EXCAVATING LLC
Employer

OC: 04/15/07 R: 02
Claimant: Appellant (2)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Charles Ruby filed an appeal from a representative's decision dated May 3, 2007, reference 01, which denied benefits based on his separation from Priority Excavating. After due notice was issued, a hearing was held by telephone on May 23, 2007. Mr. Ruby participated personally and offered additional testimony from Justin Newman. The employer participated by Toby Torstenson, President.

ISSUE:

At issue in this matter is whether Mr. Ruby was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Ruby was employed by Priority Excavating from July 26, 2004 until April 16, 2007. He was last employed full time as a crew foreman. He was discharged based on an allegation that he consumed alcohol on the job site. He never consumed alcohol during working hours. On Friday, April 6, Mr. Torstenson observed Mr. Ruby and others after work sitting in the company vehicle parked next to the job trailer. Justin Newman had gone to a local convenience store to purchase beer. Mr. Ruby did not drink any of the beer or any other alcohol during this time.

Mr. Ruby worked with Mr. Torstenson on Saturday, April 7, but was not confronted over the allegation of drinking on the job site. Mr. Torstenson was in contact with Mr. Ruby on April 9 and 10 to advise him that there would be no work due to rain. He was also in contact with Mr. Ruby on April 13. He did not mention the issue of drinking on April 9, 10, or 13. Mr. Ruby was notified of his discharge on April 16, 2007.

Mr. Ruby was also discharged because of an allegation that he allowed Justin Newman to drive a company vehicle during times he was not covered by the employer's insurance. Mr. Newman was covered by insurance from November of 2004 until approximately March 15, 2007. Both Mr. Ruby and Mr. Torstenson allowed him to operate company vehicles after March 15.

Mr. Ruby was also discharged because the employer did not feel work was getting done. Mr. Ruby was at all times working to the best of his abilities. There were times when the workload prevented him from performing all assigned work. He had never been notified that he was in danger of losing his job.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Ruby was discharged based on allegations that he consumed alcohol on job sites, allowed an uninsured individual to operate company vehicles, and failed to complete assigned work. For reasons that follow, the administrative law judge concludes that the employer has failed to establish disqualifying misconduct. Both Mr. Ruby and his witness testified that Mr. Ruby was not drinking alcohol on April 6. However, even if he had been drinking, the employer waited ten days before discharging him.

Mr. Torstenson worked with Mr. Ruby on April 7 and could have discharged him at that time but did not. He was in contact with Mr. Ruby on April 9 and 10 and could have discharged him on either date. He was also in contact with him on April 13 but did not discharge him until April 16. Whatever adverse conduct did occur on April 6 was no longer a current act in relation to the discharge that occurred on April 16. Therefore, it must be concluded that the employer failed to establish a current act of misconduct as required by 871 IAC 24.32(8). Because the employer failed to establish a current act of misconduct, the administrative law judge is not free to consider other, past acts that might constitute misconduct.

Inasmuch as the evidence failed to establish a current act of misconduct, there is no basis on which to disqualify Mr. Ruby from receiving benefits.

DECISION:

The representative's decision dated May 3, 2007, reference 01, is hereby reversed. Mr. Ruby was discharged but a current act of misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs