

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES R BALIUS
Claimant

APPEAL NO. 11A-UI-00675-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KEVIN ALLEN CONSTRUCTION INC
Employer

OC: 01/10/10
Claimant: Appellant (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Charles Balius, filed an appeal from a decision dated January 7, 2011, reference 02. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on February 24, 2011. The claimant participated on his own behalf and with Dean Grant. The employer, Kevin Allen Construction (Allen), participated by Owner Kevin Allen and Laborer Nick Allen.

ISSUE:

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

FINDINGS OF FACT:

Charles Balius was employed by Allen from September 2009 until December 16, 2010 as a full-time laborer. He had many absences beginning September 1, 2010. He was absent six days when he called in, 15 days when he was no-call/no-show, and five days when he was more than one hour late without calling. Owner Kevin Allen spoke with him frequently about the need to show up to work and to be on time, but the claimant's conduct did not improve.

On December 15, 2010, the work crew was out of town and Mr. Balius was sharing a hotel room with co-workers Nick Allen and Tyler Graham. They witnessed him drinking whiskey and cola starting around 7:00 p.m. and ending around 2:00 a.m. The next morning they tried to wake him up but were not successful. They went to breakfast and when they came back they were able to get him awake around 7:30 a.m. The two others then left for the work site, as the start time was 8:30 a.m.

Mr. Balius showed up around 10:00 a.m. still smelling of alcohol. Kevin Allen asked him why he was late and he said his two co-workers had not awakened him. When the employer questioned him about the smell of alcohol, the claimant told the employer, "You stink." At that time he was discharged.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant had been warned about his chronic absenteeism, but his attendance did not improve. The final incident was being 90 minutes late to work and still being under the influence of alcohol from heavy drinking the night before. The claimant asserted the problem was that his co-workers had not awakened him, but it not their responsibility to do so. Mr. Balias is responsible to get himself to work in the morning. Matters of purely personal consideration, such as oversleeping, are not considered an excused absence. *Harlan v. IDJS*, 350 N.W.2d 192 (Iowa 1984). The claimant was discharged for excessive, unexcused absenteeism. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

DECISION:

The representative's decision of January 7, 2011, reference 02, is affirmed. Charles Balias is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw