

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

BERRI J BISHER  
1218 – 3<sup>RD</sup> ST  
WEBSTER CITY IA 50595

KELLY SERVICES INC  
999 W BIG BEAVER RD  
TROY MI 48084-4716

Appeal Number: 04A-UI-09716-CT  
OC: 08/08/04 R: 01  
Claimant: Appellant (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

STATEMENT OF THE CASE:

Berri Bisher filed an appeal from a representative's decision dated September 2, 2004, reference 02, which denied benefits based on his separation from Kelly Services, Inc. After due notice was issued, a hearing was held by telephone on September 29, 2004. Mr. Bisher participated personally. The employer participated by Darcy Paulsen, On-Site Supervisor.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Bisher was employed by Kelly Services beginning in

October of 2003. His last assignment was with EDS, where he began working full time on July 14, 2004. He was discharged because of an incident which occurred on August 4.

On August 4, Linda Shindelar, team leader, was conducting a group meeting in which she was explaining certain procedures and policies of EDS. Mr. Bisher entered the meeting as she was explaining the proper location for pallets. Mr. Bisher had left a pallet out as instructed by another employee and felt Ms. Shindelar was accusing him of not doing his job properly. He said that he was not lazy like some of the "punk ass" other employees. He also used the terms "fuck" and "god damn" during the incident. He stated to Ms. Shindelar that, if she was not a female, he would punch her. At that point, Ms. Shindelar tugged at his shirtsleeve and stated that they needed to go to Melinda Peterson's office. After an investigation, it was determined that Mr. Bisher was the aggressor in the incident and, as a result, he was discharged on August 4, 2004.

None of the witnesses interviewed by the employer stated that Ms. Shindelar had pulled Mr. Bisher from the forklift. Mr. Bisher is six-feet tall and weights 230 pounds. Ms. Shindelar is approximately five-feet and three-inches tall and weights approximately 125 pounds. All but one of the witnesses denied that she used any profanity during the exchange.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Bisher was separated from employment for any disqualifying reason. 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. Bisher was discharged because of his insubordinate exchange with the team leader on August 4. He contended that his verbal outburst was in response to Ms. Shindelar physically assaulting him by grabbing him by the shirt and pulling him from the forklift. The administrative law judge did not find this contention credible, based primarily on the relative sizes of the parties. The witnesses to the incident did not say that he was pulled from the forklift. Mr. Bisher was already using profanity and maligning his coworkers before Ms. Shindelar touched him. She made contact with his shirt only in response to his statement that he would have punched her if she had been a male. While her touching his shirt may have been a lapse in judgment, Mr. Bisher's response was totally unreasonable in that he continued to act in a belligerent manner. Given Mr. Bisher's demeanor during the hearing, the administrative law judge is inclined to give more weight to the hearsay testimony offered by the employer than to that of Mr. Bisher.

Mr. Bisher's conduct had the potential to undermine the supervisory authority of the team leader, especially since the incident occurred in the presence of other employees. His use of profanity in an argumentative context was clearly contrary to the type of behavior the employer had the right to expect. For the reasons stated herein, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

DECISION:

The representative's decision dated September 2, 2004, reference 02, is hereby affirmed. Mr. Bisher was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility.

cfc/kjf