

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KELLIE J KIMBERLEY**  
Claimant

**APPEAL NO. 10A-UI-06072-H**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 03/21/10**  
**Claimant: Appellant (2)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Kellie Kimberley filed an appeal from a decision dated April 14, 2010, reference 01. The decision disqualified her from receiving unemployment insurance benefits. After due notice was issued, a hearing was held in Des Moines, Iowa on May 24, 2010. The claimant participated on her own behalf with witness, Tracey Abate and was represented by Michael Lewis. Care Initiatives participated by Administrator Matthew Smith, Director of Nursing Jennifer West, Director of Human Resources Ann Tippins and was represented by TALX in the person of Tom Kuiper. Exhibits One, Two, Three and Four were admitted into the record.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses, the administrative law judge finds: Kellie Kimberley was employed by Care Initiatives from May 26, 2006 until March 24, 2010 as a full-time CNA. On March 23, 2010, Administrator Matthew Smith received a letter from a former resident, Donna Abens. The letter alleged Ms. Kimberley had been drinking alcohol late in the afternoon on March 18, 2010 before her shift that night, which was from 6:00 p.m. until 10:00 p.m. Mr. Smith investigated by talking on the phone with Ms. Abens who said that she had talked to Ms. Kimberley while the claimant was at the home of a former Care Initiative employee, Kathy Purdy. Mr. Smith then called Ms. Purdy who alleged the claimant had come to her house around 2:00 p.m. that afternoon with a six pack of beer. She drank three to four beers and said that she would go to work after brushing her teeth and having something to eat and no one would notice.

After the administrator talked to the two witnesses, he interviewed all of the staff who had been working with Ms. Kimberley on the night in question. None of them had noted anything unusual about the claimant's demeanor and no one had reported her being or appearing to be, under the influence of alcohol that night. Mr. Smith and Director of Nursing Jennifer West met with

Ms. Kimberley on March 24, 2010. He discussed the letter with her and she acknowledged that she had had one beer at approximately 2:00 p.m. on March 18, but had had nothing else to drink before going to work at 6:00 p.m. She denied drinking three or four beers over the course of the afternoon but she was still discharged because the employer did not consider that Ms. Abens and Ms. Purdy had any "axe to grind" about the claimant.

Ms. Kimberley asserted that Ms. Purdy, at least, did have some reason to lie about her. After she was fired, Ms. Purdy had consistently asked Ms. Kimberley for money to buy alcohol for herself. The claimant had done so at first but had finally texted her to say that she would not give her any more money. This had occurred shortly before the letter was received from Ms. Abens. In addition, Ms. Purdy is currently caring for Ms. Abens as a private care taker.

### **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 employer has the burden of proof to establish a discharge was for substantial job-related misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer has not presented any firsthand testimony, only written statements from people whose veracity and disinterest have been called into question. The employer did not provide evidence from either of the alleged witnesses to the claimant's consumption of alcohol. 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 administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which she was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

**DECISION:**

The representative's decision of April 14, 2010, reference 01, is reversed. Kellie Kimberley is qualified for benefits, provided she is otherwise eligible.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

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