

BEFORE THE
 EMPLOYMENT APPEAL BOARD
 Lucas State Office Building
 Fourth floor
 Des Moines, Iowa 50319

ERIC J RUCKOLDT

Claimant,

and

CAPITAL CITY POWER SPORTS INC

Employer.

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HEARING NUMBER: 08B-UI-03976

EMPLOYMENT APPEAL BOARD
 DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, two members concurring, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

 John A. Peno

CONCURRING OPINION OF ELIZABETH L. SEISER:

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I would also comment that I agree with the determination that the claimant did not commit misconduct serious enough to deny benefits. I disagree with the administrative law judge's Findings of Fact that the claimant was verbally warned for saying he didn't "want to be treated like a n-gger" in the past.

I find the claimant's testimony credible that a rap song heard in the workplace used the term while he and his co-workers repeated, and that he wasn't disciplined. Additionally, the employer discovered the claimant had an OWI conviction in 2000, but there is no connection between that and his job duties. Clearly, the final incident involved inappropriate conduct on the claimant's part; however, while the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

Finally, the employer failed to produce any firsthand witnesses to the incident. According to Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976), where, without satisfactory explanation, relevant evidence within control of party whose interests would naturally call for its production is not produced, it may be inferred that evidence would be unfavorable.

Elizabeth L. Seiser

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I find that the employer had legitimate business reasons for discharging the claimant. Since the employer failed to provide proof of any prior disciplinary warnings against the claimant, the employer has failed to satisfy their burden or proof. Thus, I reluctantly affirm the administrative law judge's decision by granting benefits

As the administrative law judge's commented and it bears reiterating, the claimant deserved to be discharged. See, Budding, *supra*. However, this record as it stands does not warrant a denial of benefits.

Monique F. Kuester

AMG/ss