IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAUL A WIESKAMP
Claimant

RIVERSIDE CASINO AND GOLF RESORT
Employer

APPEAL NO. 11A-UI-09426-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/19/11
Claimant: Respondent (1)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 14, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 9, 2011. Claimant Paul Wieskamp provided a telephone number for the hearing, but was not available at that number at the time set for the hearing and did not participate. Trisha Semelroth, human resources business partner, represented the employer and presented additional testimony through Joan Eggers, security shift manager, and Megan Lynch, security director. Exhibits One and Two were received into evidence.

Mr. Wieskamp contacted the administrative law judge approximately an hour and a half after the hearing record closed. At that time, Mr. Wieskamp said that he had received proper notice of the date and time of hearing, but had missed the hearing because he thought it was set a day later than the notice indicated. The administrative law judge concluded that Mr. Wieskamp had not provided good cause to re-open the record and advised Mr. Wieskamp of his appeal rights

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Paul Wieskamp was employed by Riverside Casino and Golf Resort as a full-time security officer from 2008 until June 22, 2011, when Trisha Semelroth, human resources business partner, Joan Eggers, security shift manager, and Megan Lynch, security director, discharged him for attitude and negligence. Ms. Eggers was Mr. Wieskamp's immediate supervisor.

The final incident that triggered the discharge occurred on June 15, 2011. On that day, the security department was busy and understaffed. During Mr. Wieskamp's shift, Security Dispatcher David Sloan directed Mr. Wieskamp to do the mail run. Mr. Wieskamp demanded to go on break first. Mr. Wieskamp took a break, returned, and performed the mail run. While Mr. Wieskamp would ordinarily get a break, due to the level of business that day, other staff did

not take breaks. Later in the same shift, Security Dispatcher Steve Welding directed Mr. Wieskamp to go collect some sunglasses from the cage at a time when Mr. Wieskamp would ordinarily go to lunch. Mr. Wieskamp threw up his hands as he walked away from Mr. Welding. Mr. Wieskamp then performed the requested errand before he went to lunch. The security dispatchers had de facto supervisory authority over Mr. Wieskamp. The employer reviewed surveillance video that documented Mr. Wieskamp's conduct during the shift.

The employer saw the June 15 incidents as part of a pattern of poor attitude toward coworkers or not being a team player.

In making the decision to discharge Mr. Wieskamp, the employer also considered an incident on May 28, when Mr. Wieskamp failed to properly monitor the persons coming onto and leaving the casino floor. This was one of Mr. Wieskamp's responsibilities. Rather than position himself at the security podium so that he could keep track of people coming and going, Mr. Wieskamp positioned himself at the side of the podium, from which position he could not keep track of casino floor traffic. On that day, the Chief Operating Officer and 16 guests were able to enter onto the casino floor without being noticed by Mr. Wieskamp. This was disconcerting to the employer in part because of a similar incident in 2009, when Mr. Wieskamp failed to notice a 16-year-old entering onto the casino floor. In response to the 2009 incident, the employer had suspended Mr. Wieskamp for two days and the Iowa Racing and Gaming Commission had suspended him for five days.

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 in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that on June 15, 2011, Mr. Wieskamp refused a directive from a security dispatcher and then initially refused a second directive. In the first instance, the directive was to perform the mail run, a reasonable request. The request did not become any less reasonable due to the fact that Mr. Wieskamp wanted to go to break at that time. Mr. Wieskamp's refusal to perform the task until after he took a break was unreasonable under the circumstances. The evidence establishes a second reasonable directive on June 15, when a second security dispatcher directed Mr. Wieskamp to collect some sunglasses from the lost and found cage. While Mr. Wieskamp demonstrated poor attitude in response to the directive, he did follow the directive after his initial balking. Thus, there was no second refusal to follow a reasonable directive. The evidence in the record is insufficient to establish a pattern of unreasonable refusal to follow reasonable directives.

The evidence in the record establishes that Mr. Wieskamp was negligent in performing his duties on May 28 when he failed to notice the Chief Operating Officer and 16 other persons enter onto the casino floor. The evidence also establishes that Mr. Wieskamp was negligent in 2009 when he failed to notice a 16 year old entering onto the casino floor.

Thus, we have two incidents of negligence about two years apart, a single refusal to follow a directive for a short period, balking in response to a second directive, and the general assertion that Mr. Wieskamp was not a team player when interacting with other employees. The incidents of negligence do not indicate a pattern. The refusal to follow the directive was not part of a pattern. While it was within the employer's discretion to discharge Mr. Wieskamp from the employment for these things, the evidence fails to establish misconduct in connection with the employment rising to the level of misconduct necessary to disqualify Mr. Wieskamp for unemployment insurance benefits. Mr. Wieskamp was discharged for no disqualifying reason. Accordingly, Mr. Wieskamp is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wieskamp.

DECISION:

The Agency representative's July 14, 2011, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw