

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEVIN D DENIKE
Claimant

RIVERSIDE CASINO AND GOLF RESORT
Employer

APPEAL 19R-UI-08364-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/04/19
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On August 26, 2019, Riverside Casino and Golf Resort (employer) filed an appeal from the August 21, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Kevin D. Denike (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing for appeal 19A-UI-06777-SC-T. A telephone hearing was held on September 19, 2019. The claimant participated personally and was represented by Attorney Kelsey Marquard. The employer participated through Bryan Haas, Director of Golf Operations, and Tim Donovan, HR Director. Anna Cavanaugh was sworn in as a witness for the employer but did not testify. No exhibits were offered into the record. On September 23, 2019, the administrative law judge (ALJ) issued a decision denying benefits and reversing the unemployment insurance decision.

The claimant appealed the decision to the Employment Appeal Board (EAB) who remanded the appeal for further development of the record. Specifically, the EAB requested information related to whether the claimant actually engaged in the conduct of which led to his arrest, what was the disposition of the criminal charges, and whether the claimant acted voluntarily with the understanding it could affect his racing and gaming license. The decision in appeal 19A-UI-06777-SC-T was not vacated and remains in effect until a new decision is issued pursuant to the remand instructions.

A hearing was scheduled for November 18, 2019 and notices were mailed the parties' address of record. The claimant participated personally and was represented by Attorney Kelsey Marquard. The employer participated through Tim Donovan, HR Director, and was represented by Attorney Michael W. Heilman. The Employer's Exhibits C, D1, and E through H were admitted without objection. The Employer's Exhibits A, B, J, and K were excluded on the basis of relevance. The employer elected not to offer Exhibit I into the record. The record created for appeal 19A-UI-06777-SC-T was admitted as part of the current appeal record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Head Golf Professional beginning on January 7, 2013, and was separated from employment on May 15, 2019, when he was fired. All employees working for the employer need to acquire and maintain a license from the Iowa Gaming and Racing Commission (IGRC). If an employee is charged with criminal conduct, IGRC suspends their license. The employer's policy states if an employee's license is suspended, they are subject to discharge.

The claimant often received gifts of golf clubs from vendors that are identical to the clubs in the employer's inventory. The claimant had received numerous clubs in 2019 and decided to sell some. However, he grabbed clubs from the employer's inventory instead of his gift clubs, gave them to his friend to sell on eBay, and his friend gave him the money.

On April 15, 2019, the employer received notice from one of its vendors that a golf club with a specific serial number was for sale on eBay at a price below retail. The employer has an agreement with the vendor forbidding the sale of its product on eBay or selling its product below the contracted retail price. The vendor also reserved the right to cancel any account which was in violation of the agreement. The employer reviewed its documents and determined the club on eBay was part of its inventory and had not been given to the claimant as a gift by the vendor.

The employer provided the information to Department of Criminal Investigations (DCI) who conducted an investigation. DCI concluded the claimant had sold approximately \$1,000.00 worth of the employer's property through his friend's eBay account. DCI arrested the claimant on May 14 and he was charged with theft in the second degree. IGRC suspended the claimant's gaming license. The employer discharged the claimant as it could no longer employ him with a suspended license.

On June 26, the claimant voluntarily entered into a deferred prosecution agreement and motion for continuance as going to trial would take longer and he did not want the associated publicity. As part of the agreement, the claimant acknowledged that there was probable cause to believe the offense occurred. The claimant also understood entering into this agreement would mean his IGRC license would remain suspended. As of the date of the hearing, the claimant's IGRC license has not been restored to him.

The administrative record reflects that the claimant has not received any unemployment insurance benefits since filing a claim with an effective date of August 4, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence

submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events.

The claimant's contention that he was entitled to the golf clubs because he allowed his gifted clubs to mix with the employer's inventory is not persuasive when at least one of the golf clubs had a specific serial number traceable to the retail location to which it was sold indicating specific clubs were the property of specific individuals. The claimant committed theft from the employer when he sold the employer's inventory on eBay and kept the proceeds of the sale. The claimant acknowledged there was probable cause to show he engaged in the conduct of which he was accused. He also voluntarily entered into an agreement that he knew would affect his employability with the employer.

Additionally, the employer is not obligated to accommodate the claimant during a license suspension or revocation period but does have a legal obligation to abide by gaming statutes and regulations promulgated by the Iowa legislature and not allow unlicensed individuals to work at a gaming work site. The claimant's theft of the employer's property and his failure to maintain the racing and gaming license as a known condition of employment was misconduct sufficient to warrant a denial of benefits. Benefits are denied.

As the claimant has not received any benefits to date, the issue of overpayment is moot and no charges shall be made against the employer's account as a result of this separation.

DECISION:

Per the EAB remand, this decision vacates the decision made in appeal 19A-UI-06777-SC-T. The August 21, 2019, reference 01, unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. As the claimant has not received any benefits to date, the issue of overpayment is moot and no charges shall be made against the employer's account as a result of this separation.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn