

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RICK L KEAHNA
Claimant

**SAC & FOX TRIBE
MESKWAKI BINGO CASINO & HOTEL**
Employer

APPEAL 15A-UI-11677-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/27/15
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 16, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 3, 2015. Claimant participated. Lou Brown participated on behalf of claimant. Employer participated through human resources director, Lucie Roberts, casino cleaning manager, Jared Davenport, and administrative assistant, Faith Brown. Maria Chavez registered as a witness on behalf of the employer but did not participate. Employer Exhibit One was admitted into evidence with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an equipment crew worker from May 28, 2014, and was separated from employment on June 30, 2015, when he was discharged.

On June 23, 2015, claimant worked his scheduled shift. When Mr. Davenport came to work on June 23, 2015, he received a complaint that the third shift supervisor had received from a few team members on third shift regarding comments made by claimant. The supervisor told Mr. Davenport that that claimant had made some racial comments. Mr. Davenport then started to conduct an investigation. Richard Buffalo reported to Mr. Davenport that claimant was complaining about “lazy Mexicans.” Employer Exhibit One. Mr. Davenport spoke with Terri Hernandez, who is claimant’s niece. Ms. Hernandez stated that she heard claimant say “lazy f**king Mexicans.” Employer Exhibit One. Terri Hernandez did not want to make a written statement because of her relationship to claimant. Mr. Davenport also obtained a witness statement on June 23, 2015 from Jose Nunez Cruz. Employer Exhibit One. Mr. Cruz stated that claimant referred to “Mexican are layz don’t work.” Employer Exhibit One. Mr. Davenport obtained a written statement from Aleks Hollar. Employer Exhibit One. Aleks Hollar heard claimant tell Mr. Cruz “that he lives here and should not worry about Mexico.” Employer

Exhibit One. Mr. Hollar observed that the comments from claimant were upsetting Mr. Cruz. Employer Exhibit One. After gathering statements from employees, Mr. Davenport placed claimant on investigative leave. On June 30, 2015, Mr. Davenport told claimant he was discharged for making racial comments. After Mr. Davenport told claimant he was discharged, claimant said that Mr. Davenport was wrong, that "I'm one of the only Americans that works here. I work around a bunch of illegals."

The employer has a written policy that requires employees to refrain "from behavior or conduct deemed offensive[.]" Employer Exhibit One. The employer also has a progressive disciplinary policy, but it does have the ability to skip steps depending on the offense. Claimant was aware of the policies. Employer Exhibit One.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted and noted the dates when the witness statements were written. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 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.

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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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). "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

While the employer did not present Mr. Cruz, Ms. Hernandez, Mr. Buffalo, and Aleks Hollar to provide sworn testimony or submit to cross-examination, the combination of their written statements and Mr. Davenport, Faith Brown, and Ms. Robert's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible; specifically, Ms. Brown and Mr. Davenport were both present when Ms. Hernandez gave her statement that claimant made the comment "lazy f**king Mexicans." Employer Exhibit One.

Claimant had no prior disciplinary warnings for making racial comments since being rehired on May 28, 2015. However, claimant's argument that the employer must follow its progressive disciplinary process is unpersuasive. The employer's policy provides that it may skip steps depending on the nature of the misconduct. Certain instances of misconduct may rise to a level that requires immediate discharge as opposed to the next step in progressive discipline. Claimant's comments to Mr. Cruz and Ms. Hernandez, even though he had not been warned, rise to the level of disqualifying misconduct. Making the comment "lazy f**king Mexicans" is clearly offensive. The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has a duty to protect the safety and wellbeing of its employees. Claimant's comments were contrary to the best interests of the employer and the safety and wellbeing of its employees. It is clear from Aleks Hollar and Mr. Cruz's statements that Mr. Cruz was offended by the comments claimant was making. Employer Exhibit One. Mr. Cruz had to exercise self-control because he did not want to lose his job. Employer Exhibit One. Aleks Hollar was so concerned that he separated Mr. Cruz from claimant to allow Mr. Cruz to calm down. Employer Exhibit One. Furthermore, claimant's comment to Ms. Hernandez, "lazy f**king Mexicans" is against the best interests of the employer. Claimant's

racial comments are considered disqualifying misconduct, even without prior warning. Benefits are denied.

DECISION:

The October 16, 2015, (reference 01) unemployment insurance decision is affirmed. 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.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css