

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN CAMPBELL
Claimant

APPEAL NO. 13A-UI-11900-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**PRAIRIE MEADOWS RACETRACK
& CASINO**
Employer

OC: 09/29/13
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Prairie Meadows Racetrack & Casino (employer) appealed an unemployment insurance decision dated October 21, 2013, reference 01, which held that Justin Campbell (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 6, 2013. The claimant participated in the hearing. The employer participated through Gina Vitiritto, Employee Benefits Manager.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time housekeeper from April 9, 2012 through October 1, 2013 when he was discharged pursuant to the employer's progressive disciplinary policy. The progressive disciplinary policy provides a verbal warning, a written warning, and a suspension before an employee is terminated but the employer is not obligated to follow each step of that policy. The claimant went directly to a written warning on April 22, 2013 for using loud and inappropriate language, which included profanity, in front of co-employees. He was issued a one-day suspension on May 28, 2013 for not cleaning and maintaining his assigned work area.

The claimant's lunch break is 30 minutes but he and his co-employees go off the floor at the same time and come back to work at the same time. They also take their breaks together. The claimant spent five to seven minutes in the bathroom on June 4, 2013 and the manager met with him to see what was going on and whether or not there was a medical problem. At the time, the claimant denied any problems.

On June 30, 2013, the claimant spent 27 minutes in the bathroom. He did not contact his supervisor either before or after the incident. Instead of terminating him, the employer issued him a five-day suspension on July 3, 2013. His supervisor specifically advised him if he needed to be in the bathroom for an extended period of time, he needed to notify his supervisor. The employer offered to give him a radio if that would help him to provide notification.

On September 22, 2013, the claimant spent over 41 minutes in the restroom on two visits without notifying his supervisor. He was in the bathroom 27 minutes the first time and 14 minutes the second time. The claimant failed to contact his supervisor at any time. The employer met with him on September 24, 2013 and he claimed he had this problem since he was a child although he had no medical restrictions or medical documentation supporting that. The employer gave him until October 1, 2013 to provide medical documentation. The claimant did provide a medical note which simply said he was seen on September 27, 2013 and had chronic constipation for which he was given MiraLAX. This was insufficient and the employer went forward with his termination.

The claimant filed a claim for unemployment insurance benefits effective September 29, 2013 and has received benefits after the separation from employment in the amount of \$1,535.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on October 1, 2013 pursuant to the employer progressive disciplinary policy. He knew that his job was in jeopardy and knew he was required to contact his supervisor if he had to use the restroom for an extended period of time. It is understandable that the claimant may not have been able to notify his supervisor prior to using the restroom but there is no reason he could not have notified his supervisor after the fact, particularly when he knew his failure to do so would result in his termination. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant was overpaid benefits in the amount of \$1,535.00. The matter of whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated October 21, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css