

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FIDEL A SEGOVIA
Claimant

APPEAL NO. 12A-UI-03949-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

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

**OC: 03/11/12
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Fidel Segovia filed a timely appeal from the April 6, 2012, reference 02, decision that denied benefits. After due notice was issued, a hearing was started on May 1, 2012 and completed on May 4, 2012. Claimant Fidel Segovia participated. Teri Papesh, Human Resources Personnel Administrative Assistant, represented the employer. Spanish-English Interpreter Steven Rhodes assisted with the hearing. Workforce Advisor Phillip Peacock testified at the administrative law judge's request. Exhibits One through Fourteen were received into evidence.

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: Fide Segovia is a native Spanish speaker. Mr. Segovia is not fluent in English, does not read English, but has substantial ability to comprehend spoken English.

Mr. Segovia was employed by the Meskwaki Bingo Casino & Hotel as a full-time porter from 1998 until March 9, 2012, when Jared Davenport, Casino Housekeeping Department Manager, discharged him for sexually harassing a female coworker on March 6, 2012. During the 4:00 p.m. to midnight shift on March 6, Mr. Segovia and fellow porter Billie Jo Gonzalez were both working in the keno area and utilizing the porters' closet in that area. At one point during the shift, Mr. Segovia, Ms. Gonzalez, and porter Martha Santoya were inside the porters' closet at the same time with the door closed. While the three were in the closet, Mr. Segovia kissed Ms. Gonzalez on the cheek and slid his hand inside her pants pocket to check to see whether she was wearing any panties. This sexual advance, and others that occurred during the shift, were unwelcomed by Ms. Gonzalez, who reported the kissing incident to porter Kim Spading when Ms. Spading opened the door to the porters' closet. During the shift, Ms. Gonzalez also spoke to coworker Linda Kratoska about the unwelcomed advances. Later that evening, Ms. Gonzalez telephoned Ms. Kratoska to further confide about Mr. Segovia's unwelcomed

sexual advances. On March 7, Ms. Kratoska and Ms. Gonzalez reported Mr. Gonzalez's conduct to the management team.

On March 7, the employer suspended Mr. Segovia pending further investigation into the matter. The employer reviewed video surveillance, which showed multiple interactions between Mr. Segovia and Ms. Gonzalez, but which did not document sexually harassing behavior. The employer interviewed and collected written statements from the above-referenced employees. Mr. Segovia admitted to kissing Ms. Gonzalez in the porters' closet, but asserted that such conduct was mutual between him and Ms. Gonzalez and that she had previously kissed him. Ms. Spading, Ms. Kratoska, and Ms. Gonzalez each provided statements indicating that Mr. Gonzalez had made multiple unwelcomed sexual advances toward Ms. Gonzalez during the shift on March 6. Based on the statements, including Mr. Segovia's admission to kissing Ms. Gonzalez, the employer discharged Mr. Segovia for sexual harassment on March 9.

The employer has a written policy that prohibited sexual harassment. Mr. Segovia had worked for the employer for about 14 years and was aware of the sexual harassment policy, despite the language barrier.

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).

On the one hand, the employer's evidence consisted primarily of hearsay. On the other hand, Mr. Segovia provided testimony that was lacking in credibility. For example, Mr. Segovia's testimony that he was unfamiliar with the employer's sexual harassment policy--after working for the employer for 14 years--was wholly lacking in credibility and called into question Mr. Segovia's credibility generally. Though the employer failed to present testimony from anyone with first-hand, personal knowledge of the events in question, the employer did provide multiple statements from the employees the employer interviewed as part of its investigation. Those statements are sufficiently consistent to establish, by the preponderance of the evidence, that Mr. Segovia did indeed knowingly violate the employer's sexual harassment policy by engaging in sexually harassing behavior directed at Ms. Gonzalez.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Segovia was discharged for misconduct. Accordingly, Mr. Segovia is disqualified for benefits 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 employer's account shall not be charged for benefits paid to Mr. Segovia.

DECISION:

The Agency representative's April 6, 2012, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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