

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTOPHER T WASHBURN
Claimant

APPEAL 18A-UI-09171-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERSIDE CASINO AND GOLF RESORT
Employer

OC: 08/12/18
Claimant: Appellant (1)

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin Code r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Christopher Washburn, Claimant, filed an appeal from the August 30, 2018, (reference 01) unemployment insurance decision that denied benefits because he was discharged from work with Riverside Casino and Golf Resort for failing to follow instructions. The parties were properly notified of the hearing. A telephone hearing was held on September 20, 2018 at 11:00 a.m. Claimant participated. Employer participated through Anna Cavanaugh, Human Resources Business Partner, and Zephaniah Leaton, Executive Chef. Employer's Exhibits 1-5 were admitted.

ISSUE:

Whether Claimant's separation was a discharge 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 a Cook III with Riverside Casino and Golf Resort from February 20, 2017 until his employment ended on August 8, 2018. (Cavanaugh Testimony) Claimant's duties as a Cook III included cooking for and maintaining a buffet, preparing lists of items to be cooked, assisting lower level employees and closing duties such as cleaning counters, equipment and floors. (Leaton Testimony)

Employer has an employee handbook, which outlines a progressive discipline plan. (Cavanaugh Testimony) Claimant signed an acknowledgment of receipt of the handbook on February 20, 2017. (Cavanaugh Testimony)

Claimant was given a written warning citing general misconduct such as insubordination, taking excessive breaks, not completing his work and being disrespectful to co-workers. (Exhibit 4) The warning is not dated but was signed by claimant's supervisor on February 23, 2018 and was stamped received by human resources on March 13, 2018. (Exhibit 4) The warning does not state a date on which the misconduct occurred. (Exhibit 4) The warning directs the employer to "be specific with the situation, dates, and the relevant policy and or performance standard;" however the description of the situation or events that led to the plan are vague without dates, specific events, examples of the behaviors described or co-workers involved. (Exhibit 4)

Claimant was issued a final warning citing events that occurred on February 27, 2018. (Exhibit 3) On February 27, 2018, claimant had a verbal argument with a co-worker in which claimant used profanity; claimant also accused his supervisor of slander. (Leaton Testimony; Exhibit 3) Claimant also spent time taking photographs of the kitchen instead of completing his work. (Leaton Testimony; Exhibit 3) The warning states that claimant may be subject to further disciplinary action up to and including termination. (Exhibit 3)

On April 26, 2018, employer provided claimant with a document prepared by the executive chef explaining the employer's expectations for claimant. (Exhibit 2) Employer reviewed the document with claimant and provided claimant with a copy. (Leaton Testimony) Employer considered this document a second, final warning. (Exhibit 2; Cavanaugh Testimony) The expectations included: "comply with all reasonable requests from your management without excessive questioning, complaining or challenging the decisions of your management team." (Exhibit 2) The document also states that "failure to abide by the above behavioral expectations will result in further progressive discipline, up to and including termination." (Exhibit 2)

On August 5, 2018, claimant complained to his supervisor that the distribution of work was unfair. (Leaton Testimony; Exhibit 1) Claimant's supervisor directed claimant to return to his work completing closing duties. (Leaton Testimony; Exhibit 1) Claimant did not immediately return to work; claimant had security contact the manager on duty to report to the kitchen to serve as a mediator between claimant and claimant's supervisor. (Leaton Testimony; Exhibit 1) The manager on duty conferred with the executive chef, who determined claimant's conduct was disruptive, and then sent claimant home. (Leaton Testimony; Exhibit 1) On August 8, 2018, the executive chef and human resources director terminated claimant's employment after investigating the incident on August 5, 2018. (Cavanaugh Testimony)

REASONING AND CONCLUSIONS OF LAW:

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

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.* 367 N.W.2d 300 (Iowa Ct. App. 1985). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *Woods v. Iowa Dep't of Job Serv.*, 327 N.W.2d 768, 771 (Iowa 1982).

It is the duty of the administrative law judge, as the trier of fact, 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. *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 appearance, 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).

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I reviewed the exhibits submitted by the employer. I find the employer's version of events to be more credible than the claimant's version of those events. Claimant had received two warnings regarding insubordination and failure to complete his work duties. The written warning signed by claimant's supervisor on February 23, 2018 cites claimant as being continually insubordinate to his direct supervisor and consistently ignoring his duties as a Cook III. The list of expectations dated April 26, 2018 directs claimant to comply with all reasonable requests from management without excessive questioning, complaining or challenging the decisions of his management team. Another expectation was that claimant would remain productive throughout his shift. Despite these warnings, on August 5, 2018, claimant ignored the request from his direct supervisor to return to his closing duties, left the kitchen and sought the assistance of the Manager on Duty to serve as a witness to what claimant believed was his manager's unreasonable behavior. Not only was claimant ignoring his job duties, he was causing other employees from performing theirs. The supervisor's request for claimant to return to work was reasonable; claimant's response was not.

Claimant was insubordinate and had received prior warnings for insubordination. Claimant's actions represent a disregard of standards of behavior which his employer had the right to expect of him. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

DECISION:

The August 30, 2018, (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times his weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs