

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN D JAMES
Claimant

APPEAL NO. 11A-UI-16035-W

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITADEL BROADCASTING COMPANY
Employer

**OC: 11/20/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated December 14, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held on February 6, 2012. Claimant participated by Attorney Richard Schmidt. Steve Pilchen and Brenda Shadravan were called as witnesses. Employer participated through Business Manager Sharon Beninato and Promotions Manager Jonnie Nordacker. Employer Exhibits A through E were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds the following facts. Claimant, Brian James, has worked as an on-air personality for KGGO/KHKL since the early 1990's. He last worked for employer on November 18, 2011. He was terminated on November 21, 2011 for allegedly "fixing" an on-air competition for Zac Brown tickets to allow friends of his to win.

During the week of November 14, 2011, Promotions Manager Jonnie Nordacker noticed that several friends of Brian James had won tickets during the station's "Surprise Zac Attack" promotion. She confronted Mr. James and then turned him in to Drew Von Ahnen, the assistant program director, and Terry Peters, the market manager. An investigation was conducted which revealed that four friends of Mr. James had indeed won the prize at times when Mr. James was working. Mr. James was called in on Monday, November 21, 2011. Mr. Peters and Ms. Beninato interpreted his statements as an admission that he had "fixed" the contest and terminated him.

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.

871 IAC 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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The undersigned administrative law judge does not determine whether a termination was legal or just. The undersigned is charged with determining whether an employer has proven, by a preponderance of evidence, that an employee committed work-related misconduct. This is a higher standard. In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct.

The employer failed to prove that the contest was "fixed" or that any type of conspiracy existed to ensure that the claimant's friends would win the tickets. The claimant did acknowledge that he gave an advantage to several of his friends and acquaintances about when contest tickets would be awarded. This undoubtedly gave an unfair advantage to these individuals and assisted them in winning the tickets. When the claimant acknowledged to the employer that he had engaged in this conduct, the employer interpreted his statement as an admission that a conspiracy existed or that the contest was fixed.

Brenda Shadravan was a winner of the tickets. She testified under oath that there was no conspiracy, but rather, she was simply told of an approximate timeframe as to when the tickets would be given away. Her testimony is found credible, as is the testimony of Mr. James.

Mr. James further testified, and witness Steve Pilchen confirmed, that tipping off regular listeners or individuals who regularly helped out the station (volunteers) was a common practice at Citadel. While this practice may not seem fair on its face, absent a specific work rule or policy disallowing this type of activity, this conduct is not found to rise to the level of work-related misconduct. Consequently, the employer has failed to meet its burden and the claimant is eligible for benefits, provided he meets all other criteria.

DECISION:

The fact-finding decision dated December 14, 2011, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/kjw