

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMI S KAPAYOU
Claimant

APPEAL NO. 10A-UI-13401-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAC & FOX TRIBE
Employer

**OC: 08/15/10
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated September 17, 2010, reference 01, that denied benefits based upon the claimant's separation from Sac & Fox Tribe. After due notice, a telephone conference hearing was held on December 6, 2010. The claimant participated personally. Participating on behalf of the claimant was Patrick McMullen, Attorney at Law. The employer participated by Mr. Mark Fink, Human Resource Director.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ms. Jami Kapayou was employed by the Sac & Fox Tribe from June 4, 2008 until July 7, 2010 when she was discharged from employment. Ms. Kapayou worked as a full-time casino bingo supervisor and was paid by the hour. Her immediate supervisor was Shelly Kapayou.

The claimant was discharged based upon reports received by management indicating Ms. Kapayou had been loud and disruptive on June 30, 2010 in a lounge area of the employer's facility. Ms. Kapayou was off duty at the time. The employer believed based upon reports from observers that the claimant's conduct had violated the terms of a previous warning that had been served upon Ms. Kapayou on February 27, 2009.

During the incident on June 30, 2010, Ms. Kapayou was present but did not engage in the disruptive conduct. Two or more sisters of the claimant were present in the lounge on that date along with Ms. Kapayou. Some members of the group had become loud and vocal because of a decision to discontinue serving them alcohol. The claimant, however, did not engage in this behavior and believed that she had been misidentified by witnesses.

The decision to discharge Ms. Kapayou was delayed from June 30, 2010 until July 7, 2010 when the claimant was informed of her termination by letter.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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).

In this case Ms. Kapayou participated personally and provided sworn testimony. In contrast the evidence presented by the employer was primarily hearsay in nature. Although hearsay is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony. The administrative law judge finds the claimant's testimony to not be inherently improbable and finds the claimant credible.

The evidence in the record establishes that the claimant was discharged because of an incident that took place on June 30, 2010 when the claimant and at least two of her sisters were present during nonworking hours in the employer's casino lounge area. The decision was made to terminate the claimant after it was reported that a person indentified as Jami Kapayou had been disruptive. The employer believed that a comment of that nature violated a previous warning that had been served upon Ms. Kapayou. Ms. Kapayou testified under oath that she did not engage in loud or argumentative behavior and left the casino area when her sisters became disruptive. As the claimant's testimony is not inherently improbable it must be accorded more weight than hearsay evidence offered by the employer. For these reasons the administrative law judge concludes that the employer has not sustained its burden of proof in establishing misconduct sufficient to warrant the denial of unemployment insurance benefits.

DECISION:

The representative's decision dated September 17, 2010, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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