

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KENNETH A ZIMMERMAN**  
Claimant

**APPEAL NO. 11A-UI-04170-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PRAIRIE MEADOWS RACETRACK &  
CASINO**  
Employer

**OC: 03/06/11  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Kenneth Zimmerman filed a timely appeal from the March 31, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 12, 2011. Mr. Zimmerman participated. Gina Vitiritto, Human Resources Manager, represented the employer. Exhibits A was received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Kenneth Zimmerman was employed by Prairie Meadows Racetrack & Casino as a full-time valet from 2001 and last performed work for the employer on March 1, 2011. Mr. Zimmerman's immediate supervisor was Tony Fucaloro, Traffic Supervisor. Bill Riddle, Traffic Manager, was in turn Mr. Fucaloro's immediate supervisor.

On February 22, 2011, a coworker alleged to Mr. Fucaloro that Mr. Zimmerman had on February 19 uttered the remark, "another fucking nigger with no money" as a comment about a casino patron's failure to tip Mr. Zimmerman. The employer declines to identify the coworker who made the initial allegation. The employer does not know why the coworker waited three days to report the alleged utterance to Mr. Fucaloro. Mr. Fucaloro forwarded the allegation to Bill Riddle. Mr. Riddle and Mr. Fucaloro turned the matter over to Michelle Wilke, Human Resource Manager. Ms. Wilke and/or Samantha Cain, Assistant Manager for Security, then interviewed another coworker, who allegedly told the employer that Mr. Zimmerman had made the comment, "fucking niggers don't tip." The employer declines to identify this coworker as well. On March 1, 2011, Ms. Cain and/or Ms. Wilke interviewed two additional coworkers, whom the employer declines to identify. One of these coworkers allegedly told the employer

that Mr. Zimmerman used the “n-word” on a regular basis. One of the coworkers told the employer that Mr. Zimmerman had remarked on February 19, 2011 that a song on the radio was queer.

On March 1, 2011, Ms. Wilke spoke with Mr. Zimmerman. Mr. Zimmerman denied making the racial comment. Mr. Zimmerman admitted to saying that the song was queer. But Mr. Zimmerman had not intended that remark as a discriminatory remark. Instead, Mr. Zimmerman had used the word queer as a synonym for the word odd. Ms. Cain suspended Mr. Zimmerman pending further investigation into the alleged February 19, 2011 utterance. On March 4, 2011, the employer interviewed another coworker who alleged that he or she had heard another person comment on Mr. Zimmerman’s use of discriminatory remarks.

The employer subsequently discharged Mr. Zimmerman on March 10, 2011, based on the alleged vulgar racial remark and the separate queer remark that the employer interpreted as a derogatory remark directed at homosexuals. Mr. Zimmerman. The employer had waited until March 10 to notify Mr. Zimmerman that he could or would be discharged from the employment based on the February 19 remarks that had come to the employer’s attention on February 22.

#### **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).

The employer refuses to disclose the identity of the complaining employees or the identity of the employees the employer interviewed in the course of investigating the allegations. The employer has not provided testimony from a single person with personal knowledge of the events that triggered the suspension and discharge. The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish by a preponderance of the evidence that Mr. Zimmerman uttered the racial remark on February 19, 2011 or any other day. The weight of the evidence establishes that Mr. Zimmerman used the word queer on February 19, 2011, but did so in a grammatically correct, non-discriminatory manner. The employer has failed to present sufficient evidence to prove otherwise. The evidence fails to establish misconduct in connection with the employment.

In addition, the evidence fails to establish a current act of misconduct. The evidence establishes that the allegations that triggered the discharge came to the employer's attention on or about February 22, 2011, but that the employer waited until March 10, 2011 to advise Mr. Zimmerman that he faced possible or actual discharge from the employment in connection with the allegations. The employer has failed to present sufficient evidence to establish that Mr. Zimmerman was notified of the possibility of discharge prior to March 10, 2011. The employer has failed to present sufficient evidence to establish a reasonable basis for the lapse of time between the employer's first knowledge of the allegations on February 22 and the notice provided to Mr. Zimmerman on March 10, 2011.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Zimmerman was discharged for no disqualifying reason. Accordingly, Mr. Zimmerman is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Zimmerman.

**DECISION:**

The Agency representative's March 31, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/pjs