IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFFREY W HOLDER
Claimant

DIAMOND JO LLC
DIAMOND JO CASINO
Employer

APPEAL NO. 13A-UI-04679-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/24/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 12, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 9, 2013. Claimant Jeff Holder participated. Toni McColl represented the employer and presented testimony through Nicole Duccini. Exhibits One through Five 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: Jeffrey Holder was employed by Diamond Jo Casino in Dubuque as the full-time Director of Food and Beverage from 2008 until March 27, 2013, when Todd Moyer, General Manager, discharged him from the employment for allegedly sexually harassing a female buffet server. Mr. Holder supervised upwards of 200 employees, including the server in question. On March 26, 2013, the server contacted Nicole Duccini, Director of Human Resources, and alleged that Mr. Holder had been sexually harassing her for six or seven months. The server alleged that the conduct started out as Mr. Holder telling her that her hair looked nice on a particular day and that she looked very pretty on a particular day. The server alleged that conduct progressed to Mr. Holder telling the server that she had a nice body and nice breasts. The server was unable to provide dates of the alleged conduct, aside from the final incident, which the server alleged occurred on March 20, 2013. The server alleged to Ms. Duccini that on that date, Mr. Holder had pulled out the front of her shirt and looked down it. The server further alleged that Mr. Holder sang a tune to her, This Girl is on Fire, but changed the lyrics to say that the server was sexy. The server further alleged that Mr. Holder had on occasion turned her name badge around and run his hand down her breast, while asking her if she was winking at him. The server also alleged that Mr. Holder had put his hands on her rear.

Ms. Duccini then conferred with Mr. Moyer. Mr. Moyer and Ms. Duccini then met with Mr. Holder to discuss the allegations. Mr. Holder denied the allegations. The employer suspended Mr. Holder pending an investigation. On March 27, the server provided Ms. Duccini with a written statement. The server advised in her written statement that she had not spoken up earlier out of fear for her job. The server told Ms. Duccini that she had contacted an attorney and planned to proceed with sexual harassment charges. That same day, Mr. Moyer notified Mr. Holder that he was discharged from the employment. The employer had not conducted any investigation of the matter beyond receiving the verbal and written statement from the server and meeting briefly with Mr. Holder.

In making the decision to discharge Mr. Holder from the employment, the employer considered a reprimand that was issued to Mr. Holder in March 2012 after he put his hand on a pregnant female employee's abdomen in an attempt to feel her unborn child kick. The employee alleged that Mr. Holder had also put his hand on her lower back at the same time and uttered a comment containing sexual innuendo. The employer had suspended Mr. Holder for 14 days in connection with the incident and had warned him that he would be discharged from the employment if he engaged in any future conduct that could be perceived as harassing. The employer also considered allegations of sexual harassment made by two female employees in 2009.

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) alone. 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 administrative law judge cannot find in favor of the employer in this matter without wrongly shifting the burden of proof to Mr. Holder. That was largely the employer representative's approach at hearing. The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish by a preponderance of the evidence that Mr. Holder engaged in sexual harassment or other misconduct in connection with the allegations that triggered the discharge. The employer provided an unsworn written statement from the complaining employee. The employer elected not to have the complaining employee testify. The employer did not conduct any investigation of the allegations that triggered the discharge beyond taking a statement from the complaining employee and meeting briefly with Mr. Holder. The employer and Mr. Holder agreed that he supervised roughly 200 employees. A reasonable person would expect there to be some corroborating evidence of some kind presented regarding at least one of the several allegations, something beyond the mere unsworn allegation of the complaining party, given the number of employees present in the workplace. The employer did not provide such evidence, but relied instead on prior allegations and the prior reprimand wherein the employer acknowledged it was reprimanding Mr. Holder despite its inability to decide what exactly Mr. Holder had done or said. A reasonable person looking at the reprimand from a year earlier could see how the circumstances of that incident might have involved a misunderstanding and poor judgment, rather than an intent to harass. In any event, the employer did not present sufficient evidence to establish a current act of misconduct. That is not to say that sexual harassment, or allegations of sexual harassment, are not to be taken seriously. The employer simply did not present the evidence necessary to prove its case.

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

DECISION:

The Agency representative's April 12, 2013, reference 01, decision is affirmed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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