

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUKE WESTCOTT
Claimant

APPEAL NO. 15A-UI-04194-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HARVEY'S BR MANAGEMENT CO INC
D/B/A HORSESHOE CASINO COUNCIL BLF**
Employer

**OC: 03/08/15
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 March 25, 2015, reference 01, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on February 17, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on May 5, 2015. Claimant Luke Westcott participated. Michelle Hawkins of Equifax represented the employer and presented testimony through Aaron King and Vicki Broussard. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Three, Four, and Six through Nine into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: Luke Westcott was employed as full-time table games dealer from 2006 until February 24, 2015, when the employer discharged him from the employment for failing to follow instructions in the performance of his duties. Mr. Westcott was generally an experienced craps dealer and was often assigned to the craps gaming table. In September 2014, the employer instituted a new craps policy: "Upon establishing a new point the stickperson will tap the puck on both bases to ensure that the correct point is marked." Mr. Westcott signed his acknowledgment of the policy at the time it was instituted. The policy was instituted after confusion arose during multiple craps games. In August 2014, Mr. Westcott momentarily diverted his attention from his duties during a crap game, which led to the sort of confusion the employer desired to eliminate with the new policy. The final incident that triggered the discharge occurred on February 20, 2015, when

Mr. Westcott was working as the stickperson on the craps game and ignored the assigned supervisor's directive that he "tap the puck." When interviewed about his refusal, Mr. Westcott indicated he did not like the manner in which the directive was issued. When questioned, Mr. Westcott also made a personal attack on the supervisor, referring to the supervisor as having "little man syndrome."

The next most recent incident that factored in the discharge occurred in December 2014. Mr. Westcott was displeased that a supervisor reversed a decision he had made about a particular bet. Mr. Westcott knew that the supervisor had the authority to overrule his decision regarding the bet. When that occurred, Mr. Westcott said, "Thanks for backing me up." Mr. Westcott uttered the statement in the presence of one or more gambling patrons.

In making the decision to discharge Mr. Westcott from the employment, the employer also considered an incident in November 2014, wherein a supervisor directed Mr. Westcott to complete an employee survey and Mr. Westcott elected to take a break to eat and smoke a cigarette before he complied.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that Mr. Westcott was at times a challenging employee to manage. The weight of the evidence indicates that Mr. Westcott did indeed unreasonably ignore the supervisor's reasonable directive in connection with the February 20, 2015 craps game. The prior incidents that the employer took into consideration did not rise to the level of refusals to comply with directives. The conduct in connection with the final incident, absent prior refusal to comply with reasonable directives, did not rise to the level of misconduct that would disqualify the claimant for benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The March 25, 2015, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs