

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT K HARRIS
Claimant

APPEAL NO. 14A-UI-07581-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ISLE OF CAPRI MARQUETTE INC
LADY LUCK CASINO MARQUETTE**
Employer

**OC: 06/29/14
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 July 18, 2014, reference 01, decision 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 for no disqualifying reason. After due notice was issued, an in-person hearing was held in Decorah on October 21, 2014. Claimant Scott Harris participated. Mark Witter represented the employer and presented additional testimony through Rick Meyer and Jerry Neuhaus. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibits One and Two and Department Exhibits D-1 and D-2 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: Scott Harris was employed by Isle of Capri Marquette, Inc., d/b/a Lady Luck Casino Marquette, as a full-time maintenance technician until June 30, 2014, when the employer discharged him from the employment due to an impending loss of driving privileges. Mr. Harris' duties, and his job description, involved driving the employer's vehicles and required that Mr. Harris maintain a valid driver's license. On June 13, 2014, Mr. Harris operated his personal vehicle while under the influence of alcohol and suffered a head injury in a one-vehicle accident. Mr. Harris was transported to a hospital by ambulance. A blood sample was collected that indicated Mr. Harris had been under the influence of alcohol at the time of the accident. Because Mr. Harris had been transported to the hospital from the scene of the accident, no field sobriety tests and no preliminary breath test had been offered to him at the scene of the accident. A sheriff's deputy spoke to Mr. Harris at the hospital on June 13, 2014 and told Mr. Harris that law enforcement would be in touch with him. On June 21, 2014, the deputy contacted Mr. Harris and requested that Mr. Harris come to the sheriff's office to sign some paperwork. On June 26, 2014, Mr. Harris met with the deputy. At that time, the deputy served Mr. Harris with a written Iowa

Department of Transportation notice that his driving privileges would be revoked 10 days from the issuance of the notice based on the blood test that indicated Mr. Harris had operated a motor vehicle under the influence of alcohol. Ten days from the issuance of the notice would have been July 6, 2014. Mr. Harris would continue to have a valid driver's license up to that point.

On June 27, 2014, Mr. Harris notified the employer of the impending license revocation. Mr. Harris did not tell the employer when the revocation would take effect or how long the revocation would be in effect. On June 27, 2014, the employer offered to move Mr. Harris to a bartender/server position that would pay \$7.25 plus tips. Mr. Harris' wage in the maintenance tech position was \$15.00. On June 30, 2014, Mr. Harris notified the employer that he would not accept a change in duties and wage to become a bartender/server. At the time, the employer discharged Mr. Harris from the employment based on the impending loss of his driving privileges.

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).

In Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that when a truck driver lost his insurability because of traffic tickets he accumulated, and thereby lost his ability to perform his driving duties, the loss was self-inflicted and constituted misconduct. In Cook, the claimant's employment required that he be able to operate motor vehicles. Through commission of traffic offenses and resulting convictions, the claimant rendered himself incapable of continuing in the employment.

This case is distinguishable from Cook because at the time Lady Luck discharged Mr. Harris from the employment, Mr. Harris still had his driving privileges and the revocation had not yet gone into effect. Mr. Harris would have the right under the law to challenge the D.O.T. revocation and that would have stayed the revocation for an extended period pending an administrative hearing. Because there had been no loss of driving privileges at the time the employer discharged Mr. Harris, there was no misconduct in connection with the employment.

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 claims deputy's July 18, 2014, 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