

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

GEORGE W WILLIAMSON
2436-285TH AVE
WELDON IA 50264-8507

PRAIRIE MEADOWS RACETRACK
& CASINO INC
PO BOX 1000
ALTOONA IA 50009

Appeal Number: 06A-UI-03738-JTT
OC: 03/05/06 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant George Williamson filed a timely appeal from the March 24, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 20, 2006. Claimant participated. Human Resources Representative and Training Manager Michelle Wilke represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: George Williamson was employed by Prairie Meadows Racetrack and Casino as a full-time surveillance supervisor from December 8, 2004 until March 8, 2006, when Human Resources Director Dan Byers discharged him. A final incident that prompted the discharge is alleged to have occurred on February 23, 2006. The employer asserts that, on that date, Mr. Williamson made a remark

about surveillance employee Kathy Stone while speaking with surveillance employee Greg Lauck and/or Kevin Brannagan about tests being given to employees. The employer asserts that Mr. Williamson referred to Ms. Stone as "the retard in pink." The employer asserts that Mr. Lauck called Ms. Stone about the comment. Though the incident in question is alleged to have occurred on February 23, it did not come to the attention of the human resources department until March 2, when Assistant Director of Surveillance Elnora Michaloff and Ms. Stone reported the matter. Employer does not know when Ms. Stone learned of the alleged comment or when she brought the alleged comment to the attention of Ms. Michaloff.

On March 2, Human Resources Director Dan Byers commenced an investigation. Mr. Byers commenced the investigation by speaking with Ms. Stone and Ms. Michaloff. Soon thereafter, Mr. Byers spoke with Mr. Williamson and Surveillance Director Ray Mauer. Mr. Williamson indicated he did not recall making such a comment and indicated that if he had made such a comment, it would have been made behind closed doors in the surveillance supervisor's office. On March 6, Mr. Byers spoke with Mr. Lauck. On March 8, Mr. Byers discharged Mr. Williamson. Mr. Williamson had received no prior reprimands, counseling, or warnings.

The employer presented no testimony whatsoever from any of the individuals referenced above.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Williamson was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

The evidence in the record fails to establish a current act of misconduct that might serve as a basis for disqualifying Mr. Williamson for unemployment insurance benefits. See 871 IAC 24.32(8). The employer failed to present available direct and satisfactory evidence to corroborate the allegation that Mr. Williamson made the derogatory comment about Ms. Stone. See 871 IAC 24.32(4). Even if the evidence had established an act of misconduct, the evidence presented by the employer failed to establish when, on or before March 2, Assistant Director of surveillance Elnora Michaloff learned of the alleged incident. See 871 IAC 24.32(8).

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

DECISION:

The Agency representative's decision dated March 24, 2006, reference 01, 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.

jt/kkf