

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MATTHEW J OLSEN**

Claimant

**APPEAL NO. 14A-UI-08212-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PRAIRIE MEADOWS RACETRACK  
& CASINO**

Employer

**OC: 07/20/14**

**Claimant: Respondent (2-R)**

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

Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 7, 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. After due notice was issued, a hearing was held on August 28, 2014. Claimant Matthew Olsen participated. Michelle Wilkie represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant.

**ISSUES:**

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Matthew Olsen was employed by Prairie Meadows Racetrack & Casino from 1995 until July 18, 2014, when the employer discharged him from the employment. During the last ten years of the employment, Mr. Olsen held the position of Slot Performance Supervisor. Mr. Olsen supervised five people during his shift. Mr. Olsen had been fully trained in the employer's policies and was responsible for enforcing those policies.

On July 14, 2014, Mr. Olsen was involved in addressing an electronic slot machine that appeared to have malfunctioned. A service tech worked on the machine. The machine needed to be tested to ensure that it was working properly. The employer's standard operating

procedure called for use of a dummy ticket to test the machine. Mr. Olsen was aware of the protocol. The last player to use the machine had left the machine in a bonus play status that would pay out ten times the normal amount if the player won on the machine. There was one bonus play left on the machine. Mr. Olsen's father happened to be gambling at the casino at that time. Instead of using the dummy ticket protocol to test the machine and get the machine out of bonus play status, Mr. Olsen directed his father to the machine and had his father play the final bonus status play on the machine. A coworker reported Mr. Olsen's conduct to the employer. At the time the employer interviewed Mr. Olsen, Mr. Olsen acknowledged that using the dummy ticket protocol would have been the appropriate thing to do under the circumstances.

Mr. Olsen established a claim for benefits that was effective July 20, 2014. Thus far, Mr. Olsen has received \$2,355.00 in benefits for the period of August 3, 2014 through September 6, 2014.

### **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.

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).

The evidence in the record establishes that Mr. Olsen knowingly and intentionally deviated from the employer's standard operating procedures to engage in indirect self-dealing. Instead of using the established dummy ticket protocol to test the machine and get it out of bonus play mode, Mr. Olsen directed his father to the machine. Had Mr. Olsen's father won on the play, the employer would have had to pay out ten times the normal prize amount on the machine. That, obviously, was Mr. Olsen's hope at the time and the reason he steered his father to the machine. The conduct was in willful and wanton disregard of the employer's interests and violated the standards of the conduct that the employer reasonably expected from a supervisor charged with enforcing the employer's policies. While Mr. Olsen deflects responsibility for the incident to a subordinate, the evidence indicates that it was Mr. Olsen's decision to steer his father to the machine.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Olsen was discharged for misconduct. Accordingly, Mr. Olsen is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for future benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

Because this decision disqualifies Mr. Olsen for benefits, the \$2,355.00 in benefits that Mr. Olsen received for the period of August 3, 2014 through September 6, 2014 constitutes an overpayment.

Because the fact-finding materials were not available at the time of the appeal hearing, this matter will be remanded to the Benefits Bureau for an initial decision regarding whether the employer participated in the fact-finding interview, whether the claimant must repay the overpaid benefits, and whether the employer's account may be charged for the benefits already paid to the claimant.

**DECISION:**

The claims deputy's August 7, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged for future benefits. The claimant was overpaid \$2,355.00 in benefits for the period of August 3, 2014 through September 6, 2014. This matter is remanded to the Benefits Bureau for an initial decision regarding whether the employer participated in the fact-finding interview, whether the claimant must repay the overpaid benefits, and whether the employer's account may be charged for the benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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