

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID Z GUTIERREZ
Claimant

APPEAL NO. 11A-UI-16500-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAC & FOX TRIBE
Employer

OC: 11/27/11
Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated December 22, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 26, 2012. Claimant participated. The employer participated by Lou Brown, Employee Relations Specialist, and Terri Papesh, Administrative Assistant. The record consists of the testimony of Lou Brown; the testimony of David Gutierrez; and Employer's Exhibits 1-11. Terri Papesh did not testify. Steven Rhodes served as Spanish interpreter.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a casino and hotel that is owned by the Sac & Fox Tribe. The claimant was hired on August 19, 2009, as a vault attendant in the cage department. The claimant's last day of work was November 29, 2011. He was terminated on November 30, 2011.

The incident that led to the claimant's termination occurred on November 25, 2011. The claimant was stocking kiosks with money. He was the only person doing this particular job and the casino was busy. The claimant was stocking a particular kiosk and was joined by another employee. The claimant asked this employee to close the door. The employee refused. The claimant then used his knee to push the door shut.

Two security officers reported that the claimant kicked the door and the video footage was reviewed by security. A photograph shows the claimant with one leg raised. (Exhibit 8) Another employee is blocking the bottom part of the claimant's leg. (Exhibit 8) The claimant was frustrated because he was doing all the work and the other employee was talking to friends and employees.

The kiosk machines cost approximately \$50,000.00. The employer and the claimant dispute whether he put a dent in the door of the kiosk. The employer has a policy that requires all employees to protect casino assets.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes errors of judgment or discretion in isolated situations. The employer has the burden of proof to establish misconduct.

There is insufficient evidence in this record to establish misconduct. The only person who was an eyewitness to the incident and who testified at the hearing was the claimant. The claimant said that he used his knee in an effort to close the door to the kiosk. The employer did submit a surveillance photo, but the photo does not show the bottom part of the claimant's leg. The administrative law judge concludes that the claimant probably did use his foot and leg to close the door based on the fact that the claimant's leg is perpendicular to the ground. The claimant admitted that he was frustrated and that he should not have done what he did. There was no conclusive evidence that the machine was damaged in any way.

The most reasonable inference from the evidence is that the claimant used poor judgment in trying to close the kiosk door with his foot and leg instead of using his hand. This single incident of poor judgment or discretion does not constitute misconduct. The claimant had never been disciplined or warned about this type of conduct in the past. There is no evidence that the claimant intended to damage the kiosk. Since there is insufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated December 22, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css