IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT L MANN
Claimant

RIVERSIDE CASINO AND GOLF RESORT
Employer

APPEAL NO. 12A-UI-00206-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/11/11
Claimant: Respondent (1)

Section 96.5-2-A -- Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated January 5, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 2, 2012. Claimant participated. The employer participated by Bobbi Adamson, the human resources business partner; and Brandi Husband, the hotel housekeeping manager. The record consists of the testimony of Bobbi Adamson; the testimony of Brandi Husband; the testimony of Robert Mann; and Employer's Exhibit 1-9.

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 gaming facility with a hotel as part of the complex. The claimant was hired on June 14, 2010, as a full-time hotel custodian. His last day of work was December 8, 2011. He was terminated on December 8, 2011.

On November 30, 2011, a co employee named Matt reported to human resources that the claimant was deliberately urinating on the floor of the employee's restroom near the employee dining room. The claimant had done this several times. On November 14, 2011, it was so bad that Matt had to change his shoes after coming out of the restroom. Bobbi Adamson began an investigation. She informed Brandi Husband, housekeeping manager for the hotel. Ms. Husband told the claimant about the investigation on December 3, 2011. The claimant denied ever having urinated on the floor.

On December 8, 2011, while the investigation was ongoing, another employee reported that the claimant was sitting in the employee dining room reading a magazine. There was a photograph in the magazine of a man. This employee reported that the claimant said he "wanted to kiss his

nipples." The claimant also denied having said this and that his remark instead was that the man had a very good looking face.

The claimant had been given a final warning for conduct on March 9, 2011. Based on the final warning and these two recent incidents, the claimant was terminated.

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.

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 employer has the burden of proof to establish misconduct.

The claimant was terminated because the employer concluded that the claimant repeatedly urinated on the restroom floor and then was seen looking at a magazine and making inappropriate comments about a photograph in the magazine. The claimant denied ever deliberately urinating on the restroom floor. He admitted looking at the magazine but denied every making any comments about nipples.

The claimant provided sworn testimony whereas the employer's evidence is statements from individuals who actually witnessed the incidents. Herein lays the issue. Hearsay evidence is

admissible in unemployment insurance cases, but if the only evidence of misconduct is hearsay evidence, the employer cannot sustain its burden of proof when the claimant denies the event or events took place.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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 Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of 91) the nature of the hearsay; (2) the availability of better evidence; (30 the cost of acquiring better evidence; (4) the need for precision; (50 the administrative policy to be fulfilled." Id. at 608.

Since the individuals who actually saw the incidents did not testify, it was impossible for the administrative law judge to weigh that testimony and judge its credibility against the testimony of the claimant. The administrative law judge understands why an employer may be reluctant to ask an employee to testify. There may be good business reasons for the decision. The employer, however, does bear the burden of proof to establish misconduct. Without eyewitness testimony from individuals who actually saw the claimant do what the employer believes that he did, the burden of proof cannot be met. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated January 5, 2012, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

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