

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD W WHALEN
Claimant

APPEAL NO. 09A-UI-08746-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERSIDE CASINO AND GOLF RESORT
Employer

OC: 05/10/09
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 11, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 2, 2009. Claimant participated. Employer participated by Megan Lynch, security director, and Trisha Murphy, human resources business manager. The record consists of the testimony of Megan Lynch; the testimony of Edward Whalen; and the testimony of Josh Coates.

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 claimant worked as a security officer for the Riverside Casino. He had been employed since January 8, 2007. On April 9, 2009, Megan Lynch received a complaint from a supervisor who overheard the claimant and Josh Coates, another security officer, discussing Craig, their immediate supervisor. The claimant called Craig a “dumb ass and stupid idiot.” Ms. Lynch did not feel that comment was appropriate. She scheduled a meeting with the claimant and Craig in order to give the claimant an opportunity to air his concerns about Craig. During that meeting it was agreed that the claimant would voice any further complaints about Craig first to Craig; then to Ms. Lynch; and then to human resources. The claimant was given a final written warning concerning his comment about Craig. This meeting was held on April 19, 2009.

In early May, Craig was gone and another supervisor named Joan was in charge. The claimant and Joan were friends. The claimant sent Joan a text message telling her how much he appreciated working with her as she understood the job of being a security officer. He also expressed his concern that nothing would change. That concern related to having only five officers when the claimant felt six officers were needed. Ms. Lynch found out about the text message and felt that the claimant had violated the agreement about how to air his concerns

about Craig. She also discovered that there was very little conversation going on between the claimant and Craig.

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 discharge 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. Good faith errors in judgment or discretion are not deemed misconduct within the meaning of the statute. The employer has the burden of proof to show misconduct.

The evidence in this case has failed to establish misconduct. The claimant clearly did not like the way that Craig managed the shift. He was particularly critical of the way Craig rotated security officers and attributed this to the fact that Craig had never been a security officer before assuming his position as manager. He acknowledged making a comment about Craig and did receive a written warning about that comment. The claimant was told that in the future any concerns about Craig were to be taken up first with Craig and then with Ms. Lynch and then with human resources.

The claimant was terminated over a text message that he sent to another supervisor, who was also a friend of his. In that text message he complimented her on her management style as

opposed to Craig's style and voiced a concern over whether six officers would ever be assigned as opposed to only five. The employer felt that the claimant had deliberately taken his concerns about Craig outside the chain of management. In addition, the employer felt that the claimant had been giving Craig the "cold treatment", which meant that there was no conversation between them other than the bare minimum needed to get the job done.

After carefully considering the evidence, it is determined that the claimant's conduct after the April 19, 2009, does not constitute misconduct. The claimant may have shown poor judgment in his choice of words in the text message but an isolated example of poor judgment does not constitute misconduct. The claimant and Craig may have not been particularly communicative, but Josh Coates testified that it went both ways and that despite this lack of friendly talk between the claimant and Craig, the work the employer expected to be done was done. As the employer has not sustained its burden of proof on misconduct, benefits will be allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 11, 2009, 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/pjs