

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEPHEN P MOLITOR**  
Claimant

**APPEAL NO. 12A-UI-13049-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PRAIRIE MEADOWS RACETRACK &  
CASINO**  
Employer

**OC: 10/07/12  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated October 26, 2012, reference 01, which denied benefits. After due notice was provided, a telephone hearing was held on December 3, 2012. Claimant participated. The employer participated by Ms. Tracey Casey, Human Resource Generalist.

**ISSUE:**

The issue in this matter is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Stephen Molitor was employed by Prairie Meadows Racetrack & Casino from September 8, 2008 until October 1, 2012 when he was discharged from employment. Mr. Molitor was employed as a full-time table card dealer and was paid by the hour..

The claimant was discharged on October 1, 2012 based upon the employer's belief that Mr. Molitor had not been responsive to a directive by a pit boss on September 23, 2012. The claimant had been instructed by the pit boss to "call out all colors up and shuffles" while dealing. Because the claimant had received previous disciplinary actions and a suspension from employment he was subject to being discharged upon receiving his next warning and was discharged because the warning was issued regarding the September 23, 2012 incident.

During the incident in question Mr. Molitor was providing the required information to players but did not hear the supervisor's instruction to call out the shuffles and colors. The claimant therefore did not immediately respond to his supervisor's work-related request.

It is the claimant's belief that because the same supervisor was involved in a previous disciplinary action involving the claimant, that the was supervisor may have had a bias towards Mr. Molitor.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is 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.

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 insurance benefits. Conduct serious enough to warrant a discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a 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).

In this matter the employer chose to rely upon hearsay evidence in support of its position that the final incident that caused the claimant's discharge was an act of intentional misconduct. In contrast the claimant participated personally and provided first-hand sworn testimony denying that he had intentionally ignored work-related instructions. The claimant testified that he was giving the required call outs for colors and shuffles but believed that the supervisor had not heard him doing so. The claimant further testified that he did not hear the supervisor's directive about either calling the shuffles and colors or doing so louder and therefore the supervisor may have perceived that he was not being responsive.

Although hearsay evidence is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony providing the testimony is credible and not inherently improbable. The administrative law judge finds the claimant to be a credible witness and finds that his testimony is not inherently improbable.

The question before the administrative law judge is not whether the employer had a right to discharge the claimant for these reasons but whether the discharge is disqualifying under the provision of the Employment Security Act. While the decision to terminate Mr. Molitor may have been a sound decision from a management viewpoint the evidence in the record is not sufficient to establish intentional disqualifying misconduct at the time of separation. Benefits are allowed providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated October 26, 2012, reference 01, is reversed. The claimant was discharged under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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