

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARIN D LOHMAN
Claimant

APPEAL NO. 15A-UI-02357-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEY'S BR MANAGEMENT CO INC
Employer

OC: 01/04/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 10, 2015, reference 01, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on January 4, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on March 24, 2015. Claimant Darin Lohman participated. Amanda Lange of Equifax represented the employer and presented testimony through Vicki Broussard, Robin Reber, and Shauna Teeters. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Eight into evidence.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Darin Lohman was employed by Horseshoe Casino in Council Bluffs as a full-time table games dealer from 2010 until January 7, 2015 when the employer discharged him from the employment based on rude and insubordinate comments and conduct.

At the start of the employment, the employer provided Mr. Lohman with an employee handbook that included several company Conduct Standards. Conduct Standard # 1 provided that "Team members will demonstrate courtesy, friendliness, appropriate greetings, and an initiative to assist in professional language/ton/manner/actions with guests, co-workers, and vendors." Conduct Standard # 13 provided that "Team members will act with respect and will not demonstrate insubordination including failure to act with respect."

The final incident that triggered the discharge occurred on December 21, 2015. Mr. Lohman was assigned to deal at a high limit blackjack table. One player was seated at the table playing blackjack. Another player walked up and asked how things were going. Mr. Lohman told that person that the first player never wins when someone else sits down and that the game was not good with two players. In other words, Mr. Lohman discouraged the second player from joining the game and from wagering. Table Games Supervisor Robin Teeters was standing immediately behind Mr. Lohman at the time. Ms. Teeters heard Mr. Lohman's comments and observed his demeanor. Mr. Lohman appeared angry and barely spoke to the players. When Mr. Lohman paid out chips on winning bets, he almost tossed the chips; rather than "sizing into bets" per dealing protocol. When another employee took over the table by "tapping" Mr. Lohman out so he could take his break, Ms. Teeters called Mr. Lohman over to discuss the situation. At the time, Ms. Teeters was Mr. Lohman's immediate supervisor. Mr. Lohman shook his head and said he was done for the day. As Ms. Teeters began to tell Mr. Lohman that he needed to stop behaving in a disrespectful manner, Mr. Lohman walked away before Ms. Teeters was done speaking to him. Mr. Lohman knew that Ms. Teeters could not leave the gaming floor and, therefore, could not follow him to conclude the discussion. Mr. Lohman had made no mention to Ms. Teeters of a lack of sleep or of having a headache. Both of the blackjack players commented to the employer about Mr. Lohman's angry demeanor. After Mr. Lohman returned from his break, the employer assigned him to a different table and Mr. Lohman performed his duties for the rest of the shift without incident. Ms. Teeters did not further address the matter with Mr. Lohman. On December 22, Ms. Teeters prepared a written report concerning the matter.

After the December 21, 2014 incident, the employer did not speak to Mr. Lohman again about the matter until 12 days later on January 2, 2015. Mr. Lohman had continued to report for work and perform his duties. The casino had continued to operate every day, including on Christmas and New Year's. The casino's human resources office ordinarily operated Monday through Friday but was closed December 24, 25, and 31 and January 1. The human resources office had been open on December 22, 23, 26, 29 and 30. On January 2, Casino Operations Manager Aaron King told Mr. Lohman that the matter was being looked into and that it could result in Mr. Lohman being discharged from the employment. On January 2, Mr. King collected a written statement from Mr. Lohman. Mr. Lohman wrote "Was just not talking to player. Not being personable but if they needed anything still try and be helpful." Mr. Lohman last performed work for the employer on January 4. On January 7, the employer notified him that he was discharged.

In making the decision to discharge Mr. Lohman from the employment, the employer considered prior similar incidents. On November 8, 2014, Mr. Lohman repeatedly disregarded a supervisor's directive to alter the way he was dealing cards to comply with standard operating procedures. While Mr. Lohman now asserts that he did not understand the directive, he made no mention of a lack of understanding when given the opportunity to do so in connection with a written reprimand issued on Nov 19, 2014. On October 16, 2014, a customer asked Mr. Lohman about the particulars of a promotion where the grand prize was a car. Mr. Lohman was supposed to stay abreast of all promotions, had received information concerning the promotion, and had been provided with a card that summarized the particulars of the promotion. When the customer asked how to could win the car, Mr. Lohman told the customer, "I don't know, why don't you go find out." A supervisor was nearby and heard Mr. Lohman's comment. The employer considered three additional incidents from 2013.

Mr. Lohman established a claim that was effective January 4, 2015 and has received \$4096 in benefits for the 11-week period of January 4, 2015 through March 21, 2015. The employer participated in the February 4, 2015 fact-finding interview through Vicki Broussard, Human Resources Generalist, and Robin Reber, Casino Operations Manager.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 fails to establish a discharge based on a current act. The conduct that triggered the discharge occurred on December 21, 2014 and came to the employer’s attention at that time. The employer deferred further action on the matter and did not notify Mr. Lohman that the matter could mean discharge from the employment, until 12 days later on January 2, 2015. The employer has failed to prove a reasonable basis for the 12-day delay. The casino had continued in operation each of those days. Mr. Lohman had continued to report for his shifts. The closure of the human resources office does not provide a reasonable bases for the delay because the human resources was open several days between the date of the incident and the date that the supervisor notified the claimant that the incident could mean discharge from the employment. Because the discharge was not based on a current act, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to the claimant. Because the discharge was not based on a current act, the administrative law judge need not further consider the prior incidents that factored in the discharge.

DECISION:

The February 10, 2015, reference 01, decision is affirmed. The discharge was not based on a current act. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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