

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN J NIELSEN
Claimant

APPEAL NO. 11A-UI-06848-H

**ADMINISTRATIVE LAW JUDGE
DECISION**

**PRAIRIE MEADOWS
RACETRACK & CASINO**
Employer

**OC: 05/01/11
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Brian Nielsen, filed an appeal from a decision dated May 20, 2011, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held in Des Moines, Iowa, on June 21, 2011. The claimant participated on his own behalf. The employer, Prairie Meadows, participated by Recruiter Rebecca Fisher.

ISSUE:

This issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment benefits.

FINDINGS OF FACT:

Brian Nielsen was employed by Prairie Meadows from November 29, 2004, until May 3, 2011, as a full-time table games supervisor. He had been granted intermittent FMLA for a personal medical condition. He was able to call in using FMLA without a doctor's statement unless the absence was for more than two days.

Mr. Nielsen was scheduled to work on April 16, 2011, at 10:00 p.m., working until 6:00 a.m., on Sunday, April 17. He called in using FMLA and indicated he was going to return to work on his next scheduled day, which was 8:00 p.m. on April 17. For the shift that was to begin at 8:00 p.m. on April 17, he called in absent using personal time, because he had heard a friend and coworker had just returned from his father's funeral and there was to be a consolation gathering.

At the gathering on the evening of April 17, the claimant was seen by his supervisor and coworkers. At some point that evening, another friend and coworker texted him saying that the claimant's supervisor was angry the claimant was at the gathering, because he was believed to have called in using FMLA for that shift. Pursuant to that text message, Mr. Nielsen called security and verified that he had called in using personal time for the shift to begin on April 17.

On April 18, 2011, the claimant received a written warning for attendance. Nothing further was done until May 3, when he was discharged by Director of Human Resources Dan Byers. The only reason given was a general statement of "misconduct" because management had lost "confidence in his ability to be part of the management team." Mr. Byers felt the claimant, as a supervisor, was held to a "higher standard" as far as his attendance.

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.

In order to be disqualified from receiving unemployment benefits, the discharge must be pursuant to a current, final act of misconduct. See 871 IAC 24.32(8). The only known last incident that concerned the employer occurred over two weeks prior to the separation. The claimant did call in using personal time for the absence on April 17 and the employer has not established that that was in any way inappropriate. There appears to be some confusion as to whether or not the claimant intended to return to work on April 17 or April 18 using the FMLA, but the employer has not definitively established any sufficient rebuttal to the claimant's assertion that he intended to take FMLA for only the shift beginning the evening of April 16, 2011. It has failed to prove the claimant was discharged for any substantial job-related current act of misconduct. Disqualification may not be imposed.

DECISION:

The representative's decision dated May 20, 2011, reference 01, is reversed. Brian Nielsen is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw