

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD L HINRICHSEN
Claimant

APPEAL NO. 13A-UI-07316-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BELLE/SIOUX CITY RIVERBOAT
Employer

OC: 05/26/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Belle/ Sioux City Riverboat filed a timely appeal from a representative's decision dated June 12, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on July 9, 2013. The claimant participated. The employer participated by Ms. Queeta Hewett, Human Resource Director. Employer's Exhibits A, B, C, D, E and F were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for 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: Richard Hinrichsen was employed by Belle/Sioux City Riverboat from May 5, 1999 until May 23, 2013 when he was discharged from employment. Mr. Hinrichsen was last employed as a full-time table games dealer and was paid by the hour. His immediate supervisor was Nicole Uhl.

Mr. Hinrichsen was discharged from his employment with the captioned casino boat based upon incidents that had taken place at work on May 22, 2013. On that date the employer received a complaint that Mr. Hinrichsen had upset a patron by refusing a \$10.00 tip the patron had offered to Mr. Hinrichsen. Mr. Hinrichsen had rejected a tip telling the patron to "keep it."

Mr. Hinrichsen was called to the manager's office and the claimant's supervisor and the manager on duty met with Mr. Hinrichsen about his statements and behavior, emphasizing the necessity that patrons not be offended. The meeting ended and Mr. Hinrichsen returned to perform his services as a table dealer. Although he had just been counseled about his statements and demeanor, Mr. Hinrichsen then commented out loud about the player who had left "I wish he would get cancer and die." The claimant's statement was the subject of another complaint and Mr. Hinrichsen was returned to the office at which time he admitted making the statement. The following day, Mr. Hinrichsen met with upper management and in the presence

of Mr. Tomma again confirmed that he had made the statements attributed to him. Based upon the repetitive nature of the service complaints against Mr. Hinrichsen and his failure to heed the generalized counseling that had been given to him earlier in the shift, a decision was made to terminate Mr. Hinrichsen from his employment.

REASONING AND CONCLUSIONS OF LAW:

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

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 to establish disqualifying job misconduct. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. 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).

In this matter the evidence in the record establishes that Mr. Hinrichsen had by his statements and demeanor in refusing a \$10.00 tip offended a patron who had been gambling at Mr. Hinrichsen's table game. The patron had apparently taken Mr. Hinrichsen's rejection of the tip as demeaning to him and complained. In an effort to keep Mr. Hinrichsen, the employer verbally counseled him about the casino boat's expectations of good treatment of patrons and

allowed the claimant to return to his gaming table. Upon returning the claimant again referred to the patron who had left in a demeaning way stating that he wished that the individual would “get cancer and die.”

The administrative law judge concludes that the claimant’s repeated violation of the employer’s reasonable expectations which had recently been reinforced to him showed a willful disregard of the employer’s interests and standards of behavior and thus was disqualifying conduct under the provisions of the Iowa Employment Security Law. Unemployment insurance benefits are therefore withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual’s separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant has been deemed ineligible for benefits any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The representative’s decision dated June 12, 2013, reference 01, is reversed. The claimant was discharged under disqualifying conditions. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his

weekly benefit amount and is otherwise eligible. The issue of overpayment is remanded to the Claims Section for investigation and determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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