

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH G WINDUS
Claimant

APPEAL NO. 11A-UI-15982-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERSIDE CASINO AND GOLF RESORT
Employer

**OC: 11/13/11
Claimant: Appellant (2)**

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Kenneth Windus filed a timely appeal from the December 6, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 17, 2011. Mr. Windus participated personally and was represented by Attorney Jean Pfeiffer. Kurt Kepsack, facility director, represented the employer and presented additional testimony through Bobbi Adamson, business partner. Exhibits One through Seven were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kenneth Windus was employed by Riverside Casino and Golf Resort as a full-time maintenance mechanic from 2006 until November 7, 2011, when Kurt Kepsack, facility director, discharged him from the employment. Mr. Windus' immediate supervisor was Tony Cansler, maintenance manager.

The final incident that triggered the discharge concerned Mr. Windus' interaction with Rich Bentler, entertainment manager, during the weekend of October 29-30, 2011. On Wednesday, November 2, 2011, Mr. Bentler sent an e-mail message to Mr. Cansler in which he alleged that Mr. Windus had acted in an angry, unprofessional, and uncooperative manner when Mr. Bentley had summoned Mr. Windus to assist with unhooking power cords. The work involved accessing the electrical breaker panel and shutting the power off so that the cords could be safely disconnected. In his November 2, 2011 email, Mr. Bentler alleged that Mr. Windus had slammed the door of the breaker panel. Mr. Windus denies the allegation. While Mr. Bentler alleges the incident occurred on a Sunday evening, Mr. Windus asserts the referenced interaction was on a Saturday morning, when Mr. Windus was the sole maintenance person and was pressed for time. The employer did not conduct any investigation of the matter beyond reviewing the email message and speaking with Mr. Bentler. The employer did not interview Mr. Windus.

In making the decision to discharge Mr. Windus from the employment, the employer considered an incident from June 2011 in which Mr. Windus has raised his voice, uttered profanity, thrown a broken remote, and frightened Administrative Assistant Lisa Spivey. Trisha Semelroth, human resources business partner, had investigated that matter, which included speaking with Mr. Windus, and advised him of free services available through the employer's Employee Assistance Program.

Another incident alleged to have occurred on November 6, 2011 came to Mr. Lebsack's attention after he had discharged Mr. Windus from the employment and did not factor in Mr. Lebsack's decision.

The employer has a written policy concerning Employee Conduct & Work Rules. The policy was contained in the handbook provided to Mr. Windus at the start of the employment and reviewed with him as part of his orientation. Among other things, the policy prohibits the following behaviors:

- Fighting, intimidation or threatening violence.
- Boisterous or disruptive activity.
- Negligence or improper conduct leading to damage to property of the employer, customers or fellow employees.
- Insubordinate or other disrespectful conduct.
- The use of profane or obscene language, or any other offensive, inappropriate and/or unprofessional language.

Prior to the incident that triggered the discharge, Mr. Lebsack had, at other points during the employment, spoken to Mr. Windus regarding his interactions with other staff. Prior to the incident that triggered the discharge, a written reprimand concerning the June 2011 incident had been the only reprimand issued to Mr. Windus. Throughout the employment, Mr. Windus had received evaluations that indicated his work performance either met or exceeded the employer's expectations.

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.

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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the final incident that triggered the discharge. That matter involved Mr. Bentler, who remains in the employer's employ and presumably could have been made available to testify. In the absence of testimony from someone with personal knowledge of the final incident, the evidence fails to establish a current act of misconduct. In the absence of proof by a preponderance of the evidence of a current act of misconduct, the discharge would not disqualify Mr. Windus for unemployment insurance benefits. In the absence of proof of a current act of misconduct, the administrative law judge need not consider the prior incidents and allegations.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Windus was discharged for no disqualifying reason. Accordingly, Mr. Windus is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Windus.

DECISION:

The Agency representative's December 6, 2011, reference 01, decision is reversed. 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

jet/kjw