

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ERIC P NELSON
Claimant

APPEAL NO: 19A-UI-00747-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS IOWA MANAGEMENT CO INC H
Employer

OC: 12/23/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 16, 2019, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 7, 2019. The claimant participated in the hearing with Attorney Harley Erbe. Salia Nazarie, Human Resources Generalist; Andrew Mills, Casino Operations Manager; and Dena Shelton, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight and Claimant's Exhibit A were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time table games supervisor for Harvey's Iowa Management Company from November 8, 2017 to December 26, 2018. He was discharged for making an inappropriate comment to a guest in violation of the employer's policy.

On December 24, 2018, around 11:30 a.m. the claimant was working the craps table with three other dealers. There were eight to ten guests playing at the table, including one African-American guest. That guest was repeatedly late betting and putting his hands on the table and other players were getting annoyed. The claimant told the guest to keep his hands off the table and then stated, "Don't be that guy. People start fights if the bad number rolls. We don't need any lynching's on the table" (Employer's Exhibit Three). The guest to whom he made the comment left the table a few moments later. Dealer Scott Brockmeyer told the claimant he could not say that and that it was inappropriate (Employer's Exhibit Five).

At approximately 1:00 p.m. Casino Customer Service Representative Ed Costello received phone calls from the African-American guest's wife and sister-in-law who were present at the casino when the claimant made the lynching remark (Employer's Exhibit Four). Mr. Costello asked if they would come in and provide written statements but both stated they felt

uncomfortable and threatened (Employer's Exhibit Four). Mr. Costello then interviewed the other three dealers at the table, Mr. Brockmeyer; Melissa Kellar and Mike Wolverton (Employer's Exhibits Five, Six and Seven). Mr. Brockmeyer and Ms. Kellar both indicated they heard the claimant make the statement about lynching to the guest (Employer's Exhibits Five and Seven). Mr. Wolverton said he did not hear anything (Employer's Exhibit Six). Mr. Costello then took the claimant's statement with Human Resources Generalist Eric Morales. The employer suspended the claimant pending further investigation and as it was walking the claimant out a Council Bluffs police officer arrived to interview the claimant as the guest's wife and sister-in-law had contacted the police department. The officer told the claimant his comment was inappropriate and the police were investigating it as a threat toward the guest.

On December 26, 2018, Human Resources Generalist Salia Nazarie and Casino Operations Manager Andrew Mills notified the claimant his employment was terminated. The claimant previously received a verbal warning and written warning for performance issues. Due to the severity of the December 24, 2018 incident, the employer skipped the final written warning and stated it would have terminated the claimant even if this situation was the only issue on his record.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

While the claimant argues that the word "lynching" has no racial component, that argument is not persuasive. To many people in the African-American community, lynching is a loaded word bringing with it numerous violent and terrifying images. The fact that the word can be used to describe other, less violent events like an internet mob mentality does not lessen the racial overtones the word carries. It is also disturbing that the claimant, who testified he seldom if ever uses the word "lynching," used it when speaking to an African-American guest. Additionally, the issue is not that he reprimanded the African-American guest but of his use of the word "lynching" in doing so.

That said, however, although the claimant clearly made a regrettable remark it was his only incident of inappropriate or offensive behavior toward a guest. He credibly testified he did not intend to make a racial statement but meant to convey violence could break out if the guest continued late betting and upsetting the other players. He agrees it was a very unfortunate choice of words.

Under these circumstances, the administrative law judge must conclude this was an isolated incident of poor judgment on the part of the claimant rather than an intentional act and as such does not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The January 16, 2019, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn