

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD BRIMMER
Claimant

APPEAL NO: 09A-UI-05235-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAMOND JO LLC
Employer

OC: 12-28-08
Claimant: Appellant (1)

Section 96.5-2-a - Discharge/Misconduct
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 19, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 30, 2009. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Exhibit D-1 was admitted into evidence.

ISSUE:

The issue is whether the claimant's appeal is timely, and if so, 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: A disqualification decision was mailed to the claimant's last-known address of record on March 19, 2009. The address was inaccurate and the claimant never received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 29, 2009. The appeal was not filed until April 1, 2009, which is after the date noticed on the disqualification decision. Because the Department used an incorrect address the administrative law judge concludes the claimant's appeal is timely.

The claimant was hired by Diamond Jo Casino October 27, 2008, and was given a temporary, conditional gaming license by the state of Iowa, pending a criminal background check. He was discharged December 18, 2008, because it was discovered he provided false information on his gaming license application. The claimant indicated he had not been convicted of a felony within the last five years but had a court martial conviction by the military for theft and was given other than an honorable discharge. He was charged with petty larceny and took a plea bargain.

REASONING AND CONCLUSIONS OF LAW:

The substantive issue to be determined in this case is whether the employer discharged the claimant for work-connected misconduct. For the reasons that follow, the administrative law judge concludes he was.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for providing false information on his gaming license application which was a requirement of employment. When a person willfully and deliberately makes a false statement on an employment application, such falsification shall be an act of misconduct in connection with the employer. The statement need not be written and an omission of a pertinent fact would have the same effect. The falsification must be such that it does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy. 871 IAC 24.32(6). The Iowa Supreme Court has stated that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570, 571 (Iowa 1991). While this statement is *dicta* since the court ultimately decided Larson was discharged for incompetence not her deceit on her application,

the reasoning is persuasive. The court does not define materiality but cites Independent School Dist. v. Hansen, 412 N.W.2d 320, 323 (Minn. App. 1987), which states a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. In the case herein, the evidence does establish that the claimant would not have been hired if he had truthfully disclosed his court martial conviction. Furthermore, his false statements on his gaming license applications could subject him to criminal penalties. Work-connected misconduct as defined by Iowa law has been established and benefits are denied.

DECISION:

The claimant's appeal was timely. The March 19, 2009, reference 02, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs