

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL DALLAS**  
Claimant

**APPEAL NO: 14A-UI-06086-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**OC: 05/11/14**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 2, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 8, 2014. The claimant participated in the hearing. Aaron King, Operations Manager; Vicki Broussard, Human Resources Generalist; Tammy Shellberg, Table Games Supervisor; and Marcy Schneider, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Four 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 dealer for Harveys Casino Resorts from June 15, 2011 to May 6, 2014. He was discharged in accordance with the employer's progressive disciplinary policy.

On April 30, 2014 the claimant was dealing craps when a 90-year-old customer asked him if the point marked was a nine and the claimant replied, "What does it say?" Table Games Supervisor Tammy Shellberg was sitting at the table at the time and coached the claimant that it was "rude and unnecessary and might have been the rudest thing I've ever witnessed" and the claimant shrugged and stated, "How else do you want me to answer?" In the claimant's position at the table he had to keep his eyes focused on the dice and there were two other dealers at the table to help customers. The claimant was aware from the customer's voice that he was elderly and recognized he was a frequent customer. He did not apologize to the customer and Ms. Shellberg reported the incident to Operations Manager Aaron King. After reviewing the claimant's disciplinary record, the employer terminated the claimant's employment (Employer's Exhibit One).

On November 29, 2012 the claimant received a documented verbal warning for violating the employer's appearance standards, (Employer's Exhibit Three). He was assigned to work in the Whiskey Pit and had been told the week before he needed to wear the approved jeans according to the Whiskey Pit dress code. Instead, the claimant wore a different pair of jeans that did not match the dress code in color or style.

On June 16, 2013 the claimant received a written warning after the employer conducted a random surveillance of the claimant's game and found multiple game procedure violations.

On February 13, 2014 the claimant received a final written warning for failing to follow his allowed break time and refusal to follow his supervisor's instructions, (Employer's Exhibit Two). The claimant was scheduled to take his break and told his supervisor he was going to take an extended break because none of his coworkers were scheduled to take breaks around that time. His supervisor told him he could not take a longer break than his scheduled 20-minute break but the claimant took a 40-minute break anyway. The supervisor wanted him to open some games when he returned from his 20-minute break and did have work for him to do.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code § 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.

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). With the exception of the June 16, 2013 written warning after the employer conducted random surveillance of the claimant's table, the other warnings all revolved around the claimant's willful defiance of his supervisor or the employer's policies. On November 29, 2012 he disregarded the employer's dress code in the Whiskey Pit because he did not want to buy new jeans. The claimant should have asked permission to wear another pair of jeans other than the ones specified if he did not know whether he was going to be working in that area permanently and while he stated someone told him he did not have to buy new jeans for what was effectively a tryout, he did not indicate that on the comment line of the documented verbal warning. With regard to the final written warning February 13, 2014 the claimant blatantly ignored his supervisor's specific directive to him personally not to take an extended break and took a break double the allowed length and was gone 40 minutes instead of 20 minutes. The final incident involved the claimant's inappropriate response to a guest where instead of answering the guest's question in a polite manner the claimant answered in a way that most guests would find rude, offensive and embarrassing. When his conduct was pointed out to him he did not apologize for his actions but instead defended his behavior. All three of the incidents above were the result of conscious and deliberate actions taken by the claimant in violation of the employer's known policies, rather than simple mistakes or an isolated incident of poor judgment.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted

if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. While there is no evidence the claimant received benefits due to any fraud or willful misrepresentation, the employer did participate in the fact-finding interview both personally and by providing documentation. Consequently, the claimant's overpayment of benefits cannot be waived. The claimant has received benefits but was not eligible for those benefits. The claimant is overpaid benefits in the amount of \$2,040.00.

**DECISION:**

The June 2, 2014, reference 01, decision is reversed. 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. The claimant has received benefits but was not eligible for those benefits. The claimant is overpaid benefits in the amount of \$2,040.00.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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