

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**WESLEY M BUSHNELL  
15607 – 34<sup>TH</sup> AVE  
EAST MOLINE IL 61244**

**IOC SERVICES LLC  
1641 POPPS FERRY ROAD B1  
BILOXI MS 39532-2226**

**Appeal Number: 04A-UI-09021-HT  
OC: 07/11/04 R: 12  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant, Wesley Bushnell, filed an appeal from a decision dated August 10, 2004, reference 02. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on September 14, 2004. The claimant participated on his own behalf and with witnesses Alice Easterlund and Elizabeth Poland. The employer, IOC Services, participated by Human Resources Manager Jason True.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Wesley Bushnell was employed by IOC Services from April 18, 1995 until July 2, 2004. He was a full-time table games dealer.

On May 29, 2004, members of management became aware of guest, Mr. Taylor, manipulating the table games to place bets in an untimely manner. In craps, bets may not be placed after the 'stick man' has called out the number on the dice. The individual was requested to leave the premises but no criminal charges could be filed. The Iowa Racing and Gaming Commission was notified and did its investigation. During that investigation the employer was not allowed to conduct its own investigation or discuss the matter with the employees involved.

When the official investigation was done the results were not shared with IOC Services but it was notified it could commence its own inquiry. It was determined that Mr. Taylor was a professional cheat who, due to extremely fast timing and some diversionary tactics, was able to place bets on craps after the dice had landed but actually before the stick man had called out the number. However, the employer felt the claimant could have prevented some of the untimely bets if he had been "keeping his head down" at all times to notice the untimely bets.

A number of employees had been used by Mr. Taylor in his scam, and the level of discipline depended on many factors. The claimant was discharged because he had received a final written warning on February 19, 2004 for allowing untimely bets and the next step was discharge.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Misconduct is willful and deliberate conduct not in the best interests of the employer. In the present case the employer has acknowledged the incident which led to the claimant's discharge was orchestrated by an accomplished and well-rehearsed professional cheater with fast reflexes and a system of diversion which resulted in the bets being accepted though they were not timely. There is no evidence of Mr. Bushnell lacking ordinary diligence but only of being a victim of Mr. Taylor, who also victimized other dealers, supervisor and managers. The administrative law judge cannot conclude the claimant was guilty of deliberate conduct not in the best interests of the employer and disqualification may not be imposed.

DECISION:

The representative's decision of August 10, 2004, reference 02, is reversed. Wesley Bushnell is qualified for benefits, provided he is otherwise eligible.

bgh/tjc