

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN R GRAEVE
Claimant

APPEAL NO: 09A-UI-10357-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

OC: 06/07/09
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

Ameristar Casino Council Bluffs, Inc. filed a timely appeal from a representative's decision dated July 8, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 5, 2009. Claimant participated personally. The employer participated by Mr. Bill Stasek, Hearing Representative; Ms. Emily Jones, Team Relations Manager; and Mr. Curtis Walker, Executive Pastry Chef. Employer's Exhibits One through Nine were admitted into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: The claimant was employed by Ameristar Casino as a full-time baker III from June 15, 2008 until May 30, 2009 when she was discharged from employment. Ms. Graeve was paid by the hour. Her immediate supervisor was Curtis Walker.

The claimant was discharged when it was determined that the claimant had failed to follow established and required procedure by checking the facility's "banquet book" each day to ensure that orders were being prepared, directives were being followed and pertinent information was being relayed to staff members. The requirement that the claimant read and follow the directives in the banquet book on a daily basis was included in the claimant's job description and the claimant was reminded of the requirement in staff meetings.

On Tuesday, May 26, the banquet order was contained in the banquet book for a full sheet cake for a special guest order. Although the claimant had been reminded on Saturday, May 23 and Sunday, May 24 the requirement that the banquet book be checked daily, the claimant did not do so and the special sheet cake was not prepared. Subsequently it was determined that the cake had not been prepared and the following work shift completed the cake in time for the

order. As the claimant had been previously warned for failing follow directives and recipes on October 16, November 9, November 29 and February 13, 2009, a decision was made to terminate Ms. Graeve from her position. The claimant had been previously warned that failure to adhere to work directives in the future would result in increasing discipline, up to and including termination.

The claimant failed to read the banquet book although she was aware that she had an obligation to do so on a daily basis. The claimant cited decreased hours and increased work expectations as a possible cause for her failure to adhere to the requirements of her job description.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

The evidence in the record establishes that the claimant had demonstrated the ability to adequately perform the duties of her job as a baker III but had not done so on a consistent basis. In an effort to keep the claimant as an employee the claimant was repeatedly warned to follow work directives and recipes and had been warned that failure to adhere to the warnings would result in her termination from employment.

The claimant was discharged when she failed to follow an elementary work requirement that as a baker III she review the banquet book each day to ensure that bakery department items were timely and properly prepared as instructed by her supervisor in the banquet book. A decision was made to terminate the claimant when the claimant's failure to follow this reasonable and work-related directive caused a special order cake not to be prepared in her work shift. The claimant's failure required other shifts to use special efforts to ensure that the cake was prepared in time for its special event serving.

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 administrative law judge concludes that the claimant did not intentionally fail to follow these work directives but that the claimant's negligence or carelessness was of such a recurrence so as to manifest equal culpability under the provisions of the Iowa Employment Security Act. The claimant knew or should have known that she was expected to read and follow the directives of the banquet book each day but failed to do so. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated July 8, 2009, 2009, reference 01, is reversed. Susan Graeve is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, providing that she is otherwise eligible. The issue of whether

the claimant must repay the unemployment benefits is remanded to UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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