

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JESSE M TWOHIG**  
Claimant

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**APPEAL 15A-UI-12450-JP-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 10/11/15**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the October 30, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 30, 2015. Claimant did not participate. Employer participated through representative Michelle Hawkins, casino operations manager Robin Reber, and Susan Coffin. Senior human resources generalist Vicki Broussard appeared on behalf of the employer but did not testify. Employer exhibit one was admitted into evidence with no objection. Official notice was taken of claimant's payment records.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a table games supervisor from November 9, 2011, and was separated from employment on October 15, 2015, when he was discharged.

The employer has a policy and procedures manual. The employer also has a progressive disciplinary policy that is a three step policy. Step one is a documented coaching, step two is a written warning, and then step three is a final written warning. After the final written warning, an employee is subject to discharge upon a further violation. The employer has different areas for the disciplinary policy, such as performance/policy, attendance, or variance. Claimant was aware of the employer's policies.

The employer is regulated by the Iowa Racing and Gaming Commission on how they manage the games. The employer has to certify they are following certain policies and that they discipline when violations occur. If the employer does not follow its policies, the employer could be fined. Claimant was aware that the employer was regulated. All employees have to also be licensed by the state to be employed with the employer. Claimant was licensed.

The final incident occurred on October 13, 2015, while claimant was supervising a craps game. Claimant was observed violating multiple policies and procedures. Employer Exhibit One. Claimant was observed not clearing his hand after touching customer money and dropping the money into a cash bin. Employer Exhibit One. Claimant was also playing with the money while the game was going. Employer Exhibit One. This conduct violated the employer's written policy. The policies are in the table games supervisor manual.

Claimant was previously warned on September 23, 2015, that his job was in jeopardy and any further violation of the employer's policy or procedure may result in discharge. Employer Exhibit One. On September 23, 2015, the employer gave claimant a final written warning for not following proper procedure and mixing two different colored cards together. Employer Exhibit One. Claimant had failed to fan out the cards or count them down. Employer Exhibit One. Claimant also received a written warning September 18, 2015 for leaving the employer's property with sensitive keys on September 16, 2015. Employer Exhibit One. This is a violation of the employer's internal control policy. Employer Exhibit One. The keys had access to money and equipment. Employer Exhibit One. Claimant signed for this warning. Employer Exhibit One. Claimant was also given an informal coaching on March 28, 2015 for taking his picture with a celebrity in violation of company policy. Employer Exhibit One. Claimant was aware of the policy when the incident occurred, but still had his picture taken with the celebrity. Employer Exhibit One. On September 4, 2014, claimant was given a documented coaching for making prank calls to security to have random names paged over the security system. Employer Exhibit One. Claimant initially denied making the calls, but later admitted to doing it because he was not busy. Employer Exhibit One.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$825.00, since filing a claim with an effective date of October 11, 2015, for the three weeks ending October 31, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal or provide written documentation that, without rebuttal, would have resulted in disqualification. Ms. Coffin provided her name and contact number and Ms. Broussard's name and contact number to the fact finder prior to the fact-finding interview. Ms. Coffin and Ms. Broussard waited approximately one hour, but they did not receive a call from the fact finder to participate in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Workers in the gaming profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by the special licensing requirements. On October 13, 2015, claimant was a licensed table games supervisor. Claimant's job duties included ensuring game security and making sure dealers follow the employer's policies and procedures. On October 13, 2015, claimant was observed violating the employer's written policies by not clearing his hands after touching money and playing with money while a game was going on. Employer Exhibit One. The policies claimant violated are designed to protect the employer from possible theft or collusion. Claimant received a final written warning on September 23, 2015, that his job was in jeopardy and further violations of the employer's policies may result in discharge. Employer Exhibit One. The September 23, 2015 warning was a result of claimant's actions affecting the integrity of the game. Claimant was also warned for violating the employer's policies when he removed sensitive keys from the employer's property. Employer Exhibit One.

The employer is regulated by the Iowa Racing and Gaming Commission and is required to follow certain policies. If the employer fails to follow their policies and discipline when violations occur, the employer is subject to fines. The employer has presented substantial and credible evidence that claimant violated the employer's written policies after having been warned. This is disqualifying misconduct. Benefits are denied.

Iowa Code § 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. 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. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but

was not eligible for those benefits. Since the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal or provide written documentation that, without rebuttal, would have resulted in disqualification, claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The October 30, 2015, (reference 01) unemployment insurance 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 been overpaid unemployment insurance benefits in the amount of \$825.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal or provide written documentation that, without rebuttal, would have resulted in disqualification, and its account shall not be charged.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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