

**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**

**KENNETH J OSTERT
2598 ELM ST
DUBUQUE IA 52001**

**DUBUQUE RACING ASSOCIATION LTD
PO BOX 3190
DUBUQUE IA 52001**

**Appeal Number: 05A-UI-00856-DT
OC: 12/26/04 R: 04
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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kenneth J. Ostert (claimant) appealed a representative's January 20, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Dubuque Racing Association, Ltd. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 9, 2005. The claimant participated in the hearing. Tammi Schnee appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 15, 2003. He worked full time as a valet parking attendant at the employer's casino and greyhound racing facility. His last day of work was December 13, 2004. The employer discharged him on December 14, 2004. The reason asserted for the discharge was the suspension of the claimant's racing and gaming license.

By law, all of the employer's employees are required to hold a license from the Iowa Racing and Gaming Commission (IRGC). The work rules also require that if an employee becomes subject to a criminal charge or could potentially face a criminal charge, they must notify the employer and the IRGC representative. On or about December 11, 2004, the claimant's former girlfriend's car was vandalized off-site; the former girlfriend was angry at the claimant and indicated to him and to others that she was going to file a complaint of criminal mischief against him alleging he was responsible for the vandalism. Therefore, on or about December 12, the claimant reported the potential charges to his supervisor and the IRGC representative. The claimant denied any involvement with the vandalism. However, due to the potential of charges, the IRGC determined to investigate, and informed the claimant's supervisor that the claimant must be discharged; the supervisor so informed the claimant on December 15. Subsequently, all investigations regarding the incident were closed with no charges against the claimant.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The sole reason the employer was forced to discharge the claimant was the loss of her gaming license. Where an individual's restrictions have been self-inflicted and the individual had reason to know that her actions could jeopardize her license and that she was therefore putting her job in jeopardy, the loss of a license can be found to be intentional, and therefore disqualifying misconduct. Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980). Misconduct connotes volition. Huntoon, supra. However, where a loss of a license results in loss of an individual's employment, the discharge is not for disqualifying misconduct unless there is a showing that the individual both knew that her job was in jeopardy and that she subsequently and intentionally committed infractions that led to the loss of the license. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989).

Contrary to the employer's assertion, Iowa law provides that persons are entitled to benefits if they are "unemployed through no fault of their own," not where they are unemployed through no

fault of the employer. Iowa Code §96.2. In this case, while the employer is also not at fault, there is no evidence that the claimant intentionally acted in such a way as to jeopardize his license and thereby his employment. Although the administrative law judge can sympathize with the employer's situation insofar as being required to follow the directives of the regulatory agency to not allow the claimant to continue his employment, the employer has not provided any evidence the claimant is guilty of intentional acts leading to the loss of his license. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's January 20, 2005 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs