

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER BURTLOW
Claimant

APPEAL NO. 07A-UI-09740-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

OC: 09/02/07 R: 01
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jennifer Burtlow (claimant) appealed an unemployment insurance decision dated October 12, 2007, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Ameristar Casino Council Bluffs, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 5, 2007. The claimant participated in the hearing with Attorney Joe Basque. The employer participated through Curtis Walker, Executive Pastry Chef; Jenny Schoupe, Assistant Pastry Chef; Emily Jones, Team Relations Manager; and Marcy Schneider, Employer Representative. Employer's Exhibits One and Two were admitted into evidence. 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:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed full-time from March 3, 2003 through September 4, 2007, and she had worked her way up to a Baker III position. She was discharged for poor work performance and repeated negligence. The claimant had a lot of experience and was good at her job but her performance began to decline in May 2007. She was given a verbal coaching on May 5, 2007 for production errors, safety issues, and a poor attitude towards her fellow team members. A written warning was issued on May 21, 2007 for rude and discourteous behavior to her co-employees on May 20, 2007. This warning was eventually reduced to a verbal coaching. The claimant was also verbally coached on May 29, 2007 for producing unacceptable apple cobblers on May 27 and preparing cherry jubilee shooters incorrectly on May 29. She was coached again on June 13, 2007 as she was observed leaving the restroom without washing her hands. The claimant received a written warning for attendance on June 29, 2007.

The claimant's written warnings all indicated that performance improvement was required, but the employer determined on July 13, 2007 that the claimant's current work performance was not up to standards. As a Baker III, the claimant is required to uphold and maintain a high degree of work performance and professionalism. The employer stated the claimant was lacking in leadership, which included a lack of training, guidance and development of her fellow team members. The claimant was counseled again on July 20, 2007 for inconsistency in production and wasting of dessert product when the pecan diamonds were under baked and could not be used. On July 22, 2007, the claimant made strawberry swirl cheesecakes that could not be used. On the day before, a team member told her that room service needed chocolate dipped strawberries and she said she would take care of it but never did. The claimant received a final written warning on July 30, 2007 and was advised her job was in jeopardy. The employer felt the claimant's work performance was substandard and that she was negligent in her duties as a Baker III for her lack of communication with and development of her team members.

The incident prompting termination occurred on September 2, 2007, when the claimant made 48 chocolate layer cakes to be used the next day. The claimant knows how to test baked goods to ensure they are properly baked but simply did not do so in this case. On the following day, the employer discovered the 48 chocolate layer cakes were not done and none of the baked products could be used. The claimant was placed on management review pending termination on September 4, 2007. She could have requested management and team review before any final action was taken but she called back on September 4, 2007 and waived any further rights.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 § 96.5-2-a.

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.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for poor work performance and repeated negligence. When an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. Iowa Department of Job Service, 386 N.W.2d 552 (Iowa App. 1986). The claimant was more than capable of performing her job duties properly and was promoted to a Baker III position because of her baking skills. It appears she simply stopped caring about the food products she was making. 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 Department of Job Service, 391 N.W.2d 731 (Iowa App. 1986). The claimant was repeatedly negligent in her job duties and her job performance was not improving, even after repeated warnings. Her attorney argues that her poor performance was due to work-related stress, which certainly might explain her actions but does not excuse them. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated October 12, 2007, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw