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

JENNIFER L TOLZMAN
6240 I ST
OMAHA NE 68117

AMERISTAR CASINO CO BLUFFS INC
c/o EMPLOYER'S UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 05O-UI-07242-JTT
OC: 04/24/05 R: 01
Claimant: Respondent (1)

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 for Misconduct

STATEMENT OF THE CASE:

Ameristar Casino filed a timely appeal from the May 10, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 1, 2005. Jennifer Tolzman participated. Sandy Fitch of Employer's Unity represented the employer and presented testimony through Team Relations Manager Denver Meyer; Food and Beverage Director Andy Fotis; Beverage Manager Christine Stuck, and Beverage Supervisor Tiffany Shephard.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer Tolzman was employed by Ameristar Casino Company on a full-time basis from August 2, 1999

until April 12, 2005, when Team Relations Manager Denver Meyer discharged her for misconduct based on a breach of the employer's confidentiality policy.

Ms. Tolzman had held a number of positions with the employer. Prior to taking a maternity leave, Ms. Tolzman managed a restaurant. Ms. Tolzman returned from the leave on February 25, 2005. At that time, Food and Beverage Director Andy Fotis, who had become Ms. Tolzman's immediate supervisor three months before her maternity leave, advised Ms. Tolzman that she would not be returning to her previous position. Mr. Fotis gave Ms. Tolzman the option of accepting a demotion or being discharged. Ms. Tolzman accepted the demotion to Associate Manager in the Sports Bar. Ms. Tolzman was allowed to keep her previous pay. However, since Ms. Tolzman's previous pay was $8,000.00 to $9,000.00 higher that the Associate Managers' pay, Mr. Fotis instructed Ms. Tolzman not to disclose her salary. Mr. Fotis further advised Ms. Tolzman that she would face immediate termination if she did disclose her pay.

On March 25, Ms. Tolzman responded to the employer's need for a Boat Beverage Supervisor by transferring into that position. Beverage Manager Christine Stuck became Ms. Tolzman's immediate supervisor. Ms. Stuck and Ms. Tolzman had been colleagues for some time and, as such, Ms. Stuck had been aware of Ms. Tolzman's management salary. Prior to March 25, Ms. Stuck and Ms. Tolzman discussed the prospect of Ms. Tolzman transferring to the Beverage Supervisor position. At that time, Ms. Stuck raised the issue of Ms. Tolzman's pay. One way or another, Ms. Tolzman conveyed and Ms. Stuck concluded that Ms. Tolzman had kept her manager's pay when she became an Associate Manager in the Sports Bar. Prior to Ms. Tolzman's transfer to the Boat Beverage Supervisor position, Ms. Stuck went to Mr. Fotis with her concern that Ms. Tolzman not divulge her salary to the other Beverage Supervisors. During a meeting on March 25, Mr. Fotis again advised Ms. Tolzman not to disclose her salary and further advised that she would face immediate termination if she did. Mr. Fotis did not at that time treat the previous understanding or discussion between Ms. Stuck and Ms. Tolzman as a breach of confidentiality by Ms. Tolzman.

The final incident that prompted the discharge occurred on April 7, 2005. On that date, Ms. Tolzman was in an office area with Beverage Supervisor Tiffany Shephard and Team Member Rachel Hildreth. Ms. Hildreth raised the subject of employee salaries. During the conversation, Ms. Tolzman was asked whether her move from Associate Manager in the Sports Bar to Boat Beverage Supervisor had been a lateral transfer. Ms. Tolzman responded, "Yeah, but I'm not supposed to talk about it." Ms. Shephard then went to Ms. Stuck to complain that she was uncomfortable with Ms. Tolzman making more money than she did. The employer premised Ms. Tolzman's discharge on this sharing of information. However, the employer did not indicate to Ms. Tolzman that this conduct was the basis for her discharge until twelve days later, on April 19, when Mr. Meyer actually discharged Ms. Tolzman.

On April 11, Team Relations Manager Denver Meyer suspended Ms. Tolzman pending the outcome into an investigation into whether Ms. Tolzman had ill-treated a team member by means of the scheduling and work assignments. After Ms. Tolzman demonstrated to Mr. Meyer the reasoning behind her scheduling decisions, the complaining employee alleged that Ms. Tolzman had directed inappropriate racial remarks toward her. Ms. Tolzman is mother to a bi-racial infant. When Mr. Meyer discharged Ms. Tolzman on April 19, he did not reference either allegation as a basis for the discharge. Instead, Mr. Meyer advised Ms. Tolzman, for the first time, that her discharge was based on the employer's conclusion that she had divulged her salary after being twice instructed not to do so.

The employer has a written confidentiality policy that is reviewed with employees at the time of hire. The employer did not provide a copy of the policy, but did read the policy into the record. The policy addresses and stresses the relationships between employees and patrons, employees and vendors, and employees and competitors. The apparent purposes of the policy are to protect the employer from theft or fraud, and to protect the employer's trade secrets and/or ability to compete. The policy does not address relations between employees and does not address the sharing of salary information between employees.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Tolzman was discharged for misconduct in connection with her employment.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious

enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Before the administrative law judge can find that an employee was discharged for misconduct in connection with the employment, the evidence in the record must establish the existence of a "current act" that prompted the discharge. See 871 IAC 24.32(8). The date of the conduct that formed the basis of the discharge and the date, on or after the date of the conduct, that the employee was advised the conduct subjected her to discharge are the critical dates to be considered in determining whether the misconduct was a past or current act. See Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988)(Lapse of 4 days from final act until the claimant was notified that his conduct was grounds for dismissal, did not make final act a "past act.")

The administrative law judge must construe the eligibility provisions of the unemployment compensation law liberally, and interpret the disqualification provisions strictly, to further the purpose of the law. See Iowa Code section 96.2. See also Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85 (Iowa 1997).

Though Ms. Tolzman did not explicitly discuss her salary on April 7, she did share sufficient information with Ms. Shephard and Ms. Hildreth to alert them to the fact that she was compensated at a higher rate than others with similar duties. That Ms. Tolzman shared what she did in light of her previous discussions with Mr. Fotis shows poor exercise of discretion. The employer was within its rights to discharge Ms. Tolzman. However, Ms. Tolzman's conduct did not rise to the level of substantial misconduct necessary to disqualify her for unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The evidence in the record further indicates that Ms. Tolzman's disclosure on April 7 was no longer a "current act" of misconduct on April 19, the date upon which Mr. Meyer advised Ms. Tolzman the conduct subjected her to discharge. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Tolzman was discharged for no disqualifying reason. Ms. Tolzman is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Tolzman.

DECISION:

The Agency representative's decision dated May 10, 2005, reference 01, is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The employer's account may be assessed for benefits paid to the claimant.

jt/pjs