

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BILL J NUNO

Claimant

APPEAL NO. 06A-UI-10232-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC

Employer

**OC: 09/17/06 R: 12
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Ameristar Casino of Council Bluffs filed a timely appeal from the October 11, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 7, 2006. Claimant Bill Nuno participated. Lesley Buhler of TALX UC eXpress represented the employer and presented testimony through Team Relations Coordinator Shila Kinsley and Player Development Manager Michael Moriarty. Employer's Exhibits One through Four, Seven and Eight were received into evidence. The administrative law judge took official notice of Agency administrative records regarding benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bill Nuno was employed by Ameristar Casino of Council Bluffs as an Executive Host from May 17, 2005 until September 5, 2006, when Player Development Manager Michael Moriarty suspended him for alleged poor work performance. The employer subsequently discharged Mr. Nuno on September 12 for alleged poor work performance. As an Executive Host, Mr. Nuno was responsible for addressing the needs and/or wants of his assigned patrons/players so as to encourage and promote the player's patronage of the casino. It was the employer's policy to provide patrons with complimentary items or services based on the amount the patron wagered at the casino. Such complementary items included concert tickets for music acts performing at the casino. As an Executive Host, Mr. Nuno was also expected to make quarterly contact with his assigned patrons.

There was no particular final incident that prompted the discharge. Instead, the employer based its decision to discharge Mr. Nuno on a customer survey, a customer complaint about alleged rudeness, a customer's assertion that he did not know who his assigned Executive Host was, and Mr. Nuno's conduct in providing complementary concert tickets to a patron.

On August 11, 2006, a manager contacted Greg Heitz, a patron to whom the manager believed Mr. Nuno had provided complementary concert tickets. The ostensible purpose of the call was to follow up with Mr. Heitz to see whether he enjoyed the concert. Mr. Heitz denied any knowledge of the concert tickets. The complementary tickets reserved in the employer's computer system for Mr. Heitz had actually been given to another patron, Jason Buchholz, whose level of wagering did not qualify him for concert tickets. Mr. Buchholz had received a total of four tickets for the concert. On August 12, a manager interviewed Brian Morrison, the casino host who had actually disbursed the tickets to Mr. Buchholz. Mr. Morrison indicated that when Mr. Buchholz arrived to collect the tickets, Mr. Buchholz indicated Mr. Nuno had instructed him to collect tickets reserved in his name as well as tickets reserved in Mr. Heitz's name. On August 17, Manager Tom Manning spoke to Mr. Nuno regarding the matter. Mr. Manning did not report the result of that interview to Player Development Manager Michael Moriarty. A manager interviewed Mr. Buchholz on August 25. Mr. Buchholz indicated that he had received four tickets for the concert. The employer presented no testimony from Mr. Heitz, Mr. Buchholz, Mr. Morrison or Mr. Manning. No other investigation of the matter occurred.

On August 31, two patrons contacted Mr. Moriarty and alleged that Mr. Nuno had been rude to them when they requested complementary food. The patrons waited five days after the incident to complain about the matter. The employer did not provide testimony from the complaining patrons. The employer had not previously observed Mr. Nuno to be rude to patrons.

On August 16, the employer counseled Mr. Nuno because he had received relatively low scores as part of a customer satisfaction survey. At the time the survey was conducted, a competitor was opening for business in the same market and was plying patrons with complementary items and services. Subsequent Ameristar customer satisfaction surveys confirmed that the new competition was having a negative impact on Ameristar's customer satisfaction surveys.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Nuno was discharged for misconduct in connection with the employment. It does not.

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 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer presented insufficient evidence to substantiate or corroborate an allegation of misconduct in connection with the belated customer complaint received on August 31. The employer failed to present sufficiently direct and satisfactory evidence to prove misconduct in connection with the concert ticket matter or to prove the matter constituted a "current act" at the time of the suspension or discharge. The employer presented insufficient evidence to substantiate or corroborate the allegation of misconduct in connection with the patron who asserted he did not know who his assigned executive host was. The customer satisfaction survey results, especially in light of the changing market conditions, fail to indicate misconduct. The evidence in the record establishes no current act of misconduct that might serve as a basis for disqualifying Mr. Nuno for unemployment insurance benefits.

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

DECISION:

The Agency representative's October 11, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw