

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHAWN P OBRIEN**

Claimant

**AMERISTAR CASINO CO BLUFFS INC**

Employer

**APPEAL NO. 09A-UI-19472-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/15/09**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct  
871 IAC 24.32(1) – Definition of Misconduct  
871 IAC 24.32(8) – Current Act

**STATEMENT OF THE CASE:**

The employer appealed a department representative's decision dated December 17, 2009, reference 01, that held the claimant was discharged for no misconduct on October 23, 2009. A telephone hearing was held on February 8, 2010. The claimant participated. Emily Jones, HR Relations Manager, Tiffany Shepherd, and Jean Howe, Associate Beverage Managers, participated for the employer. Employer Exhibits 1 – 6 was received as evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a part-time server in the employer restaurant beginning September 19, 2006. The claimant averaged anywhere from 32 to 40 hours a week, and he was last supervised by Manager Shepherd. The claimant last worked on October 24, 2009 when he was terminated shortly after reporting to work.

Manager Shepherd issued a coaching form to the claimant that he signed and received on October 4 for an incident that occurred the day before. The claimant upset a customer who was waiting for service by stating the delay was due to waiting on a high roller. Shepherd advised the claimant he had been coached for an earlier behavior/guest service issue, and that any further instance could result in discipline according to employer policy.

The practice for servers was to leave the floor (assigned restaurant section) the last hour of their shift with supervisor approval in order to do side work prior to leaving. The claimant was upset with Shepherd about how she handled his transfer request, and the parties were not speaking directly to one another. On October 16, the claimant advised a co-worker, server he was leaving the floor to do his side worker, and the other server said he would cover for him. Shepherd confronted the claimant about leaving the floor, and he responded in a disrespectful

manner with inappropriate body language in the presence of guests and co-workers. The claimant did finish his work shift, and called in an absence from work on the following day.

The claimant worked several days leading up to October 24. A supervisor prepared a coaching form on October 18 for the claimant incurring six occurrences calling in an absence from work. The employer has a no-fault attendance policy. The coaching was submitted and received by the claimant on October 24 when he was discharged by Supervisor Shepherd for violating the code of conduct for team members.

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

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 administrative law judge concludes that the employer failed to establish a current act of misconduct in the discharge of the claimant on October 24, 2009.

The employer offered six, multi-page exhibits but none of the documents contained the code of conduct or disciplinary policy relied upon for discharge. If the claimant's conduct was so inappropriate on October 16, there is no employer explanation why it allowed him to continue to work and issue him a warning about attendance on the day he was discharged. If Supervisor Shepherd believed the claimant was insubordinate to her requests regarding work on October 16, then she could have suspended him and sent him home rather than let him complete his shift and continue working for several days. While the claimant may have been

rude and displayed disrespectful body language, it does not rise to the level of job disqualifying misconduct.

**DECISION:**

The decision of the representative dated December 17, 2009, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct in connection with employment on October 24, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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