

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**WALTER BRAUER**  
Claimant

**PRAIRIE MEADOWS RACETRACK & CASIN**  
Employer

**APPEAL 18A-UI-12466-CL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/02/18**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the December 26, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A hearing was held in Des Moines, Iowa, on January 18, 2019. Claimant participated personally and was represented by Dave Butts. Employer participated through human resource generalist Pamela Anderson and table games manager Chris Wilhelm. Employer's Exhibits 1 through 3 were received.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 17, 2005. Claimant last worked as a full-time poker dealer. Claimant was separated from employment on November 20, 2018, when he was terminated.

Employer has a poker dealer handbook with a policy stating that if there is a discrepancy on the table, the floor supervisor will rely on the dealer to provide detailed information regarding the situation. Employer has a policy stating employees can be terminated for theft, misappropriation, failure to account for, misuse, or unauthorized possession of company, customer or co-worker property. Claimant was aware of the policies.

In October 2018, claimant made a statement to another employee about how he was able to avoid having variances in his bank. The employee became suspicious that claimant was conducting himself in an unethical manner. The employee reported the suspicion to management.

On October 16, 2018, director of surveillance Kevin Brannen requested a close surveillance watch on claimant.

The surveillance footage showed on October 17, 2018, showed an incident described by employer as follows:

On October 17, 2018, at 2206 hours on Poker Table 6 Brauer removed 5 \$1 chips from the bank and placed them into the pot. Brauer then removed a \$5 chip and placed it to the box for the rake, instead of into the bank. At 2206 hours Brauer appeared to notice that he had 2 \$5 chips for the rake, removed one and placed it back into the pot. At this time his bank was \$5 short. At 2221 hours Brauer gathered all chips for the pot using his cards. One \$5 chip was palmed under the cards, and it appeared that Brauer attempted to drop the \$5 chip into the bank, but missed. The \$5 chip went back into the pot. At 2224 hours Brauer made a motion to place a chip into the pot, without removing a chip from the bank. Brauer then removed 5 \$1 chips from the pot and placed into his bank.

The surveillance ended on November 11, 2018.

A report was compiled on November 14, 2018. The report listed other incidents during the surveillance where claimant took actions that created variances. Employer did not consider any of the incidents, other than the October 17, 2018, incident, to be terminable.

Claimant was suspended the same day the report came out.

On November 20, 2018, claimant was terminated for his actions on October 17, 2018.

Claimant was coached for having variances in his bank on January 14, 2017, and March 27, 2018.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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 Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, claimant's actions of balancing his bank by taking chips from the pot in a later hand amounted to theft from a customer. Although claimant did not monetarily benefit from his actions, he personally benefited from them by not having to account for a variance in his bank at the end of the shift. The customer who won the pot in question was shorted because of claimant's actions. Claimant's actions on October 17, 2018, were in his own interest and in deliberate disregard of the customer's interest. The previous coachings regarding variances were not for similar conduct as there was no allegation any money was taken from a customer in those instances. However, even without prior warning, employer has established claimant was terminated for misconduct. As a veteran poker dealer, claimant knew or should have known he could not take money from the pot in a later hand to balance his bank.

**DECISION:**

The December 26, 2018, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Decision Dated and Mailed

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