

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KASSANDRA L NARCISO

Claimant

APPEAL NO. 11A-UI-03854-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC

Employer

OC: 01/30/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated March 16, 2011, reference 01, which denied unemployment insurance benefits based upon the claimant's separation from Ameristar Casino Council Bluffs Inc. After due notice, a hearing was held in Council Bluffs, Iowa on May 5, 2011. The claimant participated personally. Participating as a witness for the claimant was her father, Dennis Venable. Although duly notified, the employer did not respond to the notice of hearing and did not participate.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Kassandra Narciso was employed by Ameristar Casino Council Bluffs from January 2007 until January 10, 2011 when she was discharged from employment. Ms. Narciso held the position full-time bus person and was paid by the hour. Her immediate supervisor was John Nosel.

The claimant was discharged January 10, 2011. At the time of discharge the claimant was told that she was being terminated because she had "too many warnings." Ms. Narciso had received a warning on January 6, 2011 about going to break too late and about her vacuuming duties. Ms. Narciso had to go to break late as the employee who went to break ahead of the claimant did not return timely. Ms. Narciso denied performing her vacuuming duties in an unacceptable way. Ms. Narciso had no other job infractions between the time that she was warned on January 6 and her discharge on January 10, 2011.

Ms. Narciso denies being tardy and maintains that her discharge was related to an on-the-job injury and the employer's failure to assign her to light-duty work as required by her doctor limitations. The claimant believes that because she complained about her job assignments she was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of benefits. 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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

In this matter the claimant appeared personally and testified under oath denying being excessively tardy or performing her duties below her capabilities. The claimant testified that after she complained about job assignments that exceeded her light-duty limitations from a work-related injury, she began to receive warnings from the employer that were not justified and subsequently was discharged. The evidence in the record does not establish the claimant was excessively tardy or that she performed below her capabilities. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 16, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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