

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS S MURRAY
Claimant

APPEAL NO. 07A-UI-01354-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

**OC: 12/03/06 R: 01
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 January 29, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 21, 2007. Claimant Nicholas Murray did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Rachel Thompson of Unemployment Services/TALX represented the employer and presented testimony through Team Relations Coordinator Shila Kinsley. The administrative law judge took official notice of the Agency's record of payments to the claimant.

The administrative law judge indicated at the hearing that he would take official notice of the official Clerk of District Court records maintained by the Iowa Judicial Branch and made available to the public at www.iowacourts.state.ia.us. However, because the employer was not aware of the court records at the time it discharged Mr. Murray and, therefore, did not consider the court records in making its decision to discharge Mr. Murray, the administrative law judge concludes it would be inappropriate for the administrative law judge to consider the court records in deciding this matter.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nicholas Murray was employed by Ameristar Casino of Council Bluffs from October 10, 2006 until November 21, 2006, when the employer discharged him. The employer discharged Mr. Murray in response to learning from the Iowa Racing and Gaming Commission (IRGC) that Mr. Murray's application for a permanent gaming license was denied and his temporary gaming license was revoked. The employer did not further investigate with Mr. Murray why he had been unable to obtain the gaming license. The IRGC would have provided the reason for the Commission's decision to Mr. Murray, but would not have provided the reason to the employer.

Mr. Murray had completed a written application for the employment. The application included a question regarding whether the applicant had ever been convicted of a crime or was awaiting trial. Mr. Murray answered, "Never." Mr. Murray was interviewed by a recruiter, who indicated in her notes, "Background is good." Mr. Murray completed a separate application for a temporary and permanent gaming license. Mr. Murray signed a form indicating that he believed he was capable of obtaining a gaming license.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Murray 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 evidence in the record establishes that the employer discharged Mr. Murray solely because he was unable to obtain an license from the Iowa Racing and Gaming Commission. At the time the employer decided to discharge Mr. Murray, the employer had no information beyond the mere fact that Mr. Murray had been denied a gaming license. The evidence in the record is insufficient to establish that Mr. Murray willfully or deliberately made any misrepresentations in his application for employment, his interview, or in the application for the gaming license.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Murray was not discharged for a reason that would disqualify him for unemployment insurance benefits. Accordingly, Mr. Murray is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Murray.

DECISION:

The Agency representative’s January 29, 2007, reference 02, 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