

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA R VANDEWALLE
Claimant

APPEAL NO. 13A-UI-04042-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SAC & FOX TRIBE
MESKWAKI BINGO CASINO & HOTEL**
Employer

**OC: 03/25/12
Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The Sac & Fox Tribe filed a timely appeal from a representative's decision dated March 28, 2013, reference 04, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on May 9, 2013. Although the claimant was notified, there was no participation by Ms. VandeWalle. The employer participated by Ms. Lucy Roberts, Human Resource Director and Ms. Nicole Kapayou, Acting Food and Beverage Manager. Employer's Exhibits One through Six were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Melissa VandeWalle was employed by the Sac and Fox Tribe at the Meskwaki Bingo Casino & Hotel from July 3, 2012 until March 7, 2013 when she was discharged from employment. Ms. VandeWalle was employed as a full-time cocktail waitress and was paid by the hour plus tips. Her immediate supervisor was Steve Anderson.

Ms. VandeWalle was discharged on March 7, 2013 for violation of the Meskwaki Bingo Casino & Hotel's zero-tolerance policy regarding the consumption of alcohol on Meskwaki Bingo Casino & Hotel property. Under the provisions of the company's written policy, employees are subject to discharge if they are intoxicated on company property due to alcohol or other substances and tribal law enforcement is required to intervene because the of the employee causing a disturbance. Ms. VandeWalle was aware of the policy and had specifically acknowledged receiving the policy. (See Employer's Exhibit Three).

On or about February 25, 2013, Ms. VandeWalle was off duty and in the casino lounge at the time of "last call." The bartender declined to serve Ms. VandeWalle because she appeared to

be intoxicated. Although employees attempted to quiet Ms. VandeWalle, the claimant became increasingly angry and disruptive requiring the intervention of the tribal police to quiet Ms. VandeWalle. Another guest had also complained about Ms. VandeWalle's intoxication and demeanor.

Because the claimant appeared to be intoxicated and had been disruptive and tribal police had to be called to quiet the claimant, a decision was made to terminate Ms. VandeWalle for violation of the company's zero-tolerance policy.

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 unemployment insurance benefits. It does.

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. 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).

In this matter the evidence establishes that the claimant was discharged for violation of a known and reasonable company policy which prohibited casino employees from being intoxicated and disruptive on casino property while off duty. The evidence establishes that the claimant was aware of the policy and had specifically acknowledged receiving the policy.

Under the terms of the policy employees are subject to discharge if they appear to be intoxicated and they are disruptive and tribal police are called to intervene because of the employee's conduct. Because the final incident included all of the criteria and the employer believed that the claimant was beginning a pattern of conduct of that nature, a decision was made to terminate Ms. VandeWalle from her employment with the Sac & Fox Tribe.

There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in showing that the claimant's discharge took place under disqualifying conditions.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated March 28, 2013, reference 04, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is

otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the Claims Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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