

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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CHARMAINE A THOMAS	:	
	:	
Claimant,	:	HEARING NUMBER: 09B-UI-06486
	:	
and	:	
	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
AMERISTAR CASINO COUNCIL BLUFFS	:	
	:	
Employer.	:	

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2-a**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2009) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:



The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The claimant was a long-term employee (13 years) (Tr. 2, 8) whose previous warnings involved performance issues that she readily addressed with improvements. (Tr. 9) As for the final incident that occurred on February 8, 2009, the claimant mistakenly replaced a bent card with another card of a different suit. (Tr. 3-4) At the time the incident occurred, the claimant was watching over several games, "... more than normal..." and dealt with several machines that kept breaking down. When the claimant changed out the bent card for a replacement card, she did not realize she had replaced the bent card with a card of a different suit. (Tr. 9) Ms. Thomas credibly testified that this inadvertence was not intentional. (Tr. 9)

The employer discovered her mistake later that same day when both of the suits came up at the same time on the table. (Tr. 3) The employer's confirmation of Ms. Thomas' error came after reviewing

“... several hours of tape...” (Tr. 4) Yet, the record establishes that the claimant was not terminated until a month later, which detracts from the currentness of Ms. Thomas’ mishap.

871 IAC 24.32(8) provides:

*Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. *The termination of employment must be based on a current act.* (Emphasis added.)

The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a “current act,” the date on which the conduct came to the employer’s attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. Neither party shed light on why the employer did not terminate the claimant within a few days of having knowledge of her mistake. And even for the sake of argument, had the employer terminated her that very day, we would find that this was an isolated instance that didn’t rise to the legal definition of misconduct.

**DECISION:**

The administrative law judge’s decision dated May 22, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

**DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv