

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**GARY UTTERBACK
7430 BEDFORD AVE
OMAHA NE 68134**

**AMERISTAR CASINO
COUNCIL BLUFFS INC
c/o EMPLOYERS UNITY INC
PO BOX 749
ARVADA CO 80006-9000**

**Appeal Number: 04A-UI-04018-ET
OC 03-14-04 R 01
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 31, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 3, 2004. The claimant participated in the hearing. Denver Meyer, Team Relations Manager, and Lucy Hengen, Employer Representative, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time environmental services deep cleaner for Ameristar Casino from March 10, 2003 to March 9, 2004. On February 16, 2004, the claimant received a final

written warning for inappropriate contact with co-workers Sylvia Mosler and David Smith after he “flipped them off,” swore at them, and rammed a vacuum cleaner into Mr. Smith’s foot two times. The claimant was upset because he asked Ms. Mosler out in December 2003 and, although she said she would go out with him, they never actually had a date, and he was not aware she was dating Mr. Smith until seeing them together February 16, 2004. Ms. Mosler had also complained she felt the claimant was always watching her. The warning stated the claimant was to avoid all personal contact with Ms. Mosler and Mr. Smith and directed him to find a supervisor if he felt he might do something inappropriate. On March 4, 2004, EVS Supervisor Helen Curtis observed the claimant watching Ms. Mosler and follow her into the sports bar. He met Ms. Mosler as she was exiting the sports bar, which was closed at the time with its curtains drawn. The claimant was not assigned to work in the sports bar. Team Relations Manager Denver Meyer met with the claimant and asked why he went in the sports bar when Ms. Mosler was in there. The claimant said he went to look at a video game in the bar and denied he was following Ms. Mosler. The video game had been there six months and the claimant was not on break at the time he went to the sports bar. The employer terminated the claimant’s employment March 9, 2004, for violation of its harassment policy after receiving a final written warning.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The claimant was warned not to have any contact with Ms. Mosler after he behaved inappropriately and unprofessionally toward her February 16, 2004. Despite that warning, however, the claimant followed Ms. Mosler into the closed sports bar. Although he denies that he was following her and testified he went in to look at a video game, he was not on break at the time and the game had been there for six months, which suggests he was following her. The claimant's behavior caused Ms. Mosler to fear him and the fact he disregarded the final written warning prohibiting contact with Ms. Mosler demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The March 31, 2004, reference 01, decision is reversed. 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. The claimant is overpaid benefits in the amount of \$1,122.00.

je/b