

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA R COMAR
Claimant

APPEAL NO. 12A-UI-00477-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BELLE/SIOUX CITY RIVERBOAT
Employer

OC: 12/04/11
Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated January 5, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 9, 2012. Claimant participated. The employer participated by Donna Beck-Willems, Human Resources Business Partner; Pat Brentlinger, Department Head; and Glaucia Stecklberg, Human Resources Business Partner. The record consists of the testimony of Donna Beck-Willems; the testimony of Pat Brentlinger; the testimony of Melissa Comar; and Employer's Exhibits 1-6. Glaucia Stecklberg did not testify.

ISSUES:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a gaming facility located in Sioux City, Iowa. The claimant was hired on February 1, 2007. Her last day of work was December 6, 2011. She was terminated on December 6, 2011. At the time of her termination, she was a full-time valet supervisor.

The incident that led to the claimant's termination occurred on December 4, 2011. The claimant was contacted repeatedly by an individual who was a friend of the foster family where the claimant had lived for many years. This individual wanted the claimant to lend her some money. The claimant was contacted by phone; by text; and personally at her home. The claimant finally decided to lend this individual \$60.00. The individual gave the claimant her food stamp card, known as an EBT, which the individual said could be used for collateral.

That evening the individual called the claimant and said she could not repay the money. She had lost it all gambling. The claimant decided to quickly use the individual's food stamp card before the individual asked for the card back. The claimant purchased items with the food stamp card so that she would not be out the \$60.00 she had lent to the individual.

The employer found out about the transaction shortly thereafter. It was reported to the state police representative and to the Iowa Racing and Gaming Commission. The police representative interviewed the claimant and Pat Brentlinger, head of valet and security, was allowed to listen in on the interview. During the interview the claimant admitted that she had lent the \$60.00 and that she had been given a food stamp card as collateral. She then used the card to purchase items so that she could recover the loan. The claimant was terminated on December 6, 2011, for violation of employer policies.

The investigation is still ongoing. No criminal charges have yet been filed. The claimant's gaming license has not been revoked by the Iowa Gaming and Racing Commission.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer has the right to set workplace rules and standards of conduct. An employer can prohibit immoral and/or indecent conduct. Since the employer is heavily regulated by the Iowa Racing and Gaming Commission, violations of state gaming commission laws and/or company internal gaming laws can be grounds for termination. The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant used an EBT card that belonged to another person in order to obtain repayment of a \$60.00 loan. The claimant lent a patron of the casino \$60.00 and when that patron said that she could not repay the money because she lost it gambling, the claimant took the patron's EBT card and bought food stuffs so that she would not be out the money.

EBT cards are access devices that resemble bank debit cards and are used to electronically access food stamp benefits. Possessions or use of food stamps or an EBT access device by unauthorized persons or by authorized persons in a manner not authorized by the Secretary of Agriculture, violates the Food Stamp Act 7 U.S.C. 2024. According to the United States Department of Agriculture, Office of the Inspector General, Washington D.C. 20250, one of the most common form of food stamp fraud, known as food stamp trafficking, involves the illegal buying or selling of food stamp benefits for cash, drugs, weapon or other items of value. Unlawful possession or use of food stamp benefits in an amount of \$100 or more is a felony; less than \$100.00 is a misdemeanor.

The claimant's own testimony established a prima facie case that she violated the Food Stamp Act by taking the card as collateral for a loan of \$60.00 and then using the card herself to get her money back. It is important to note that the claimant loaned the money so that the individual could use the money to gamble. By loaning a patron of the casino money, the claimant clearly acted contrary to her employer's interests. The claimant's conduct was directly connected to her employment. Her employer forbids immoral or indecent conduct and any conduct that violates state gaming rules and internal rules of the casino. The claimant may have felt pressured to loan the money but she admitted that she did not seek help from law enforcement or her employer when she was asked repeatedly for the money. The claimant's actions show more than an error in judgment or discretion. She engaged in illegal conduct that violated her employer's policies and her employer's fundamental interests. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated January 5, 2012, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css