

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

SHARON L WEBB
3015 W 35TH ST
DAVENPORT IA 52806

IOC SERVICES LLC
1641 POPPS FERRY RD B1
BILOXI MS 39532-2226

IOC DAVENPORT INC
RHYTHM CITY CASINO
212 BRADY ST
DAVENPORT IA 52801

Appeal Number: 05A-UI-08624-DT
OC: 07/24/05 R: 04
Claimant: Appellant (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

STATEMENT OF THE CASE:

Sharon L. Webb (claimant) appealed a representative's August 16, 2005 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from IOC Services, L.L.C. doing business as Rhythm City Casino (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 7, 2005. This appeal was consolidated for hearing with one related appeal, 05A-UI-08625-DT. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a representative could be reached for the hearing and did not participate in the hearing. The administrative law judge is aware of the fact that the employer's corporate office is based in Biloxi, Mississippi and was and is likely not in operation as of the time of the hearing due to Hurricane Katrina. However, the administrative law judge also notes that one of the hearing

notices in this case did go to the employer's Iowa address of record. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 15, 2004. She worked full time as a cage cashier in the employer's Davenport, Iowa riverboat casino doing business as Rhythm Casino. Her last day of work was July 25, 2005. The employer discharged her on that date. The reason asserted for the discharge was having a \$300.00 shortage on July 24, 2005.

The claimant had occasionally had cash discrepancies in the past, but most of them had ultimately been resolved by the next day when the nightly processes were run or when someone would find later money or a check that had gotten stuck in a tube or slipped under the keyboard. She had received some warnings for discrepancies, but had not been informed that any of them was considered a final warning. She was unaware if there was any particular threshold or significance to the fact that the variance on this occasion was higher than usual.

On July 24 the claimant had worked an 11:00 a.m. to 7:00 p.m. shift, and when she counted her drawer at the end of her shift, she was aware she was short \$300.00. She called a supervisor, who recounted the drawer and who also came up \$300.00 short. The supervisor told her not to worry, that the money would likely be found when the overnight processes were run. The next morning, the claimant called in several times before her shift to find out if the discrepancy had been found, which is what she had done in the past when there had been a variance. However, no one could or would tell her anything. She reported in for work on July 25 and did work for a few hours before a manager from another area came and told her she was being discharged due to the discrepancy. She was not shown any paperwork or given any response to verify that the shortage had not been found or where the discrepancy might have occurred.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the cash discrepancy on July 25, 2005. The mere fact that an employee might have various incidents of

unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally or wantonly carelessly caused the shortage. Under the circumstances of this case, the cash shortage was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 16, 2005 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/kjw