

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD E CHEREK
Claimant

APPEAL NO. 11A-UI-06056-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

WILD ROSE CLINTON LLC
Employer

OC: 04/03/11
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated April 27, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 14, 2011, in Davenport, Iowa. Claimant participated. Employer participated by Sharon Dehart, human resources manager; May Kuehl dual rate; Natasha Grogan, dual rate; and Kathy Trevino, casino manager. The employer was represented by Randy Currant, attorney at law. The record consists of the testimony of Sharon DeHart; the testimony of May Kuehl; the testimony of Natasha Grogan; the testimony of Ronald Cherek; and Employer's Exhibits 2-39. There is no Exhibit One. Exhibit 39 is the surveillance video, which is in CD form.

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 casino located in Clinton, Iowa. The claimant has been employed by the casino on two different occasions. His second period of employment began on November 27, 2004. He was a full-time dealer. The claimant's last day of work was April 4, 2011. He was terminated on April 5, 2011.

The incident that led to the claimant's termination took place on April 3, 2011. Casino operations are subject to strict regulation. Table games are constantly monitored by personnel who are actually present on the floor and watch games in progress. In addition, surveillance cameras record casino games and this footage is also watched closely. Strict rules are in place on every aspect of the gaming process. These rules are standard in the industry and are mandated by the Iowa Racing and Gaming Commission. The two most important aspects of a

dealers' job are professionalism and game protection. (Exhibit 29) In order to protect the games, a dealer must never turn his or her back on a bankroll even if standing at a dead table. (Exhibit 29) A dealer never leaves a table in the middle of a hand. (Exhibit 28) This rule is also in effect: "The outgoing dealer with palms up will back out of the game toward the right looking to the left for the oncoming dealer with palms up for all games except craps and then the dealer will turn toward the boxperson and with palms up exit the game." (Exhibit 28) An incoming dealer taps the outgoing dealer on the shoulder to enter the game. There is no other procedure for entering or leaving the game. The purpose of putting palms up is to show the surveillance camera that the outgoing dealer is not taking anything away from the table when being relieved.

Craps is a table game played with dice. Two persons must be on the game at all times, even if no players are present. The stick person gives the player the dice, calls out the numbers rolled and retrieves the dice. The stick person also watches the bankroll as an additional check that the correct amount is paid to a player. The other person on the game is the boxperson. The boxperson is in charge of the bankroll and pays out the players if a winning throw is made.

If a dealer is to be relieved in craps, the dealer who is going to enter the game taps the exiting dealer on the right shoulder. The incoming dealer comes into the box and watches the bankroll at all times. Once the incoming dealer is in the box and watching the game, the exiting dealer turns to incoming dealer and spreads finger and hands, palms up, for the surveillance camera. The outgoing dealer then backs away from the game.

On April 3, 2011, the claimant was the boxperson on the craps game. There were no players at the game. Mary Kuehl was the supervisor. She came up to the craps table to watch the game. She stood next to the claimant in the box and was watching the game. There was \$80,000.00 on the table. Mary Kuehl made a joking comment to the claimant that he was in "her space." The claimant said that he was supposed to be dealing this game. Mary Kuehl then said that she did not see his name on it. The claimant then left the table. Mr. Kuehl kept her eyes on the table but motioned the claimant to come back. He did come back after approximately ten seconds.

Natasha Grogan was the stick person. She asked the claimant if he was trying to get fired. He said he did not care and that "she said my name is'nt [sic] on this." (Exhibit 27) Ms. Grogan then asked the claimant if he knew how much trouble he could get into, he responded "I don't care, maybe she should'nt [sic] have said that then?" (Exhibit 27)

The claimant's actions on April 3, 2011, were deemed insubordination and a serious violation of the standard operating procedure that a dealer never turns his or her back on the game. The claimant had been demoted from a supervisor's position on September 13, 2010 and suspended for one day on January 3, 2011, for a time clock violation.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The evidence is uncontroverted that one of the most important and fundamental rules in the gaming industry is that a dealer never turns his or her back on a table or walks away from a table without being properly relieved by another dealer. This a standard operating procedure for this employer and a requirement of the Iowa Racing and Gaming Commission. It is standard in the industry. The claimant knew this rule and its importance. The issue in this case is whether the claimant violated this rule on April 3, 2011.

The surveillance tape (Exhibit 39) shows that the claimant did indeed walk away from the craps table where he was assigned as the boxperson. There was \$80,000.00 on the table at the time. The claimant testified that his supervisor, Mary Kuehl, had relieved him. Ms. Kuehl was working as a supervisor that morning. She testified that she came up to the table as part of her supervisory duties. She did not relieve him. There were some joking comments made about being in each other's space. The claimant thought he was being relieved because she told him that his name was not written down anywhere.

The most credible testimony comes from Natasha Grogan. She was the stick person on the game. She testified that Ms. Kuehl did not relieve the claimant. The video does not show Ms. Kuehl tapping the claimant on the shoulder as required by the standard operating procedure. Ms. Grogan, who is also responsible for writing rules, testified that there is only one way a dealer is relieved and that is by the shoulder tapping. A reasonable inference from the testimony is that the claimant was annoyed by Ms. Kuehl's comments and decided to walk away and let Ms. Kuehl deal the game. This inference is supported by Ms. Grogan's testimony that

the claimant said he did not care if he got in trouble or was fired and that Ms. Kuehl should not have said what she did.

The claimant knew that he could not leave the game or turn his back on the game unless he was properly relieved. He was not. He became annoyed or angry over Ms. Kuehl's presence and deliberately chose to walk away from the table. This is insubordination, which is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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 April 27, 2011, 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/pjs