

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DIANA K DEGEORGE

Claimant

AMERISTAR CASINO COUNCIL BLUFFS

Employer

APPEAL 16A-UI-13097-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/06/16

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Code § 96.5(1) – Voluntary Quitting

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the November 29, 2016 (reference 01) unemployment insurance decision that allowed benefits to the claimant based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on December 29, 2016. The claimant, Diana K. DeGeorge, participated personally. The employer, Ameristar Casino Council Bluffs, participated through Hearing Representative Dave Peterson; witness Thleen Blood; and witness Nikki Speight. Employer's Exhibits 1 was admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records including the fact finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a front desk worker at the employer's hotel and casino. Claimant was employed from April 24, 2008 until November 9, 2016 when she was discharged from employment. Claimant's job duties involved making hotel room reservations for guests, answering telephones, customer service, and training new employees. Jon Wooten was claimant's immediate supervisor.

This employer has a code of ethical business conduct. See Exhibit 1. The written policy states that an employee can be subject to dismissal or other appropriate action for violations of the code of conduct. See Exhibit 1. The code of conduct provides that "[a] 'conflict of interest'

occurs when an individual's private interest interferes in any way – or even appears to interfere – with the interests of the Company as a whole. A conflict situation can arise when a Team Member takes actions or has interests that may make it difficult to perform his or her Company work objectively and effectively. Conflicts of interest also arise when a Team Member, or a member of his or her family, receives improper personal benefits as a result of his or her position in the Company.” See Exhibit 1. The code of conduct further provides that “[a]ll Team Members shall, in the performance of his or her duties, always act in the best interests of the Company.” See Exhibit 1. Lastly, the code of conduct provides that “Team Members shall not offer or accept kickbacks, bribes, or gifts of substantial value.” See Exhibit 1.

On October 20, 2016 claimant received a written warning for job performance when she reserved several rooms for the Fiona family. The Fiona family is personal friends of the claimant. When claimant booked the rooms she logged the rooms as being free to the family under the employer's customer loyalty program, however, the family did not qualify for free rooms. This matter was discussed with claimant and the rooms were cancelled because the family could not afford to pay the correct listed rate for the rooms.

This employer has a strict “No I.D. No Key” rule; meaning, that the person whose name the reservation is made for must personally appear to check into the room. This is a common practice and is known as part of claimant's job duties. The front desk personnel must check the person's identification (“I.D.”) and have them sign a reservation form which holds the person liable for any damage to the room. The person who is the named credit card holder must also sign a form authorizing a \$50.00 charge for possible damage or other incidentals charged during the stay at the hotel. Claimant was aware of these policies as she had been trained on the policies and even trained other new personnel on proper front desk procedures.

The final incident occurred on or about November 8, 2016 when an audit revealed that claimant had improperly reserved rooms again for the Fiona family. For this occasion claimant reserved rooms for the Fiona family using her brother's name and customer loyalty program to reserve the rooms. Claimant's brother qualified for free lodging under the employer's customer loyalty program. Claimant then used her own personal credit card to reserve the room with the \$50.00 refundable fee. This was done so that the Fiona's did not have to pay for the rooms. When the Fiona family checked in to the hotel, claimant signed her own name to her brother's reservation, even though she was not the named party on the reservation. Her brother never appeared in person to sign the reservation for the room, as required by the employer's policy. She then signed her own name for the credit card authorization. Claimant was discharged for violating proper front desk procedures in failing to have the named person on the registration personally appear and sign the reservation form as well as for violation of the code of ethical business conduct.

Claimant has received unemployment insurance benefits in the gross amount of \$2,274.00 for seven weeks between November 12, 2016 and December 24, 2016. Employer did not participate in the fact finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that Ms. Speight's testimony is more credible than claimant's testimony.

Just weeks prior to her discharge claimant had committed violations of proper reservation procedures which involved attempting to arrange for free room accommodations for this same family. Claimant's job duties included following the necessary and required guidelines that were in place for reservations and check-in, including ensure that the correct price for the rooms was computed.

An employer has a right to expect that an employee will follow proper reasonable procedures which are put in place by the employer. In this case, that included not engaging in conflicts of interest and following proper check-in procedures. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case. Claimant's continued actions of failing to follow the employer's policies constitute an intentional and substantial disregard of the employer's interest and is indicative of a deliberate disregard of the employer's interests. This reoccurrence after being warned rises to the level of willful misconduct. As such, benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7)a-b, 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) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of

discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those benefits, *even though the claimant acted in good faith and was not otherwise at fault*. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7).

In this case, the claimant has received benefits, but was not eligible for those benefits. Since the benefits were not received due to any fraud or willful misrepresentation by the claimant and the employer did not participate in the fact-finding interview, the claimant is not obligated to

repay to the agency the benefits she received in connection with this employer's account and this employer's account shall be charged.

DECISION:

The November 29, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible. The claimant has been overpaid unemployment insurance benefits but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and as such, its account shall be charged.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

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