

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN P SMITH

Claimant

APPEAL NO. 11A-UI-10492-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC

Employer

OC: 07/10/11

Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

John Smith filed a timely appeal from a representative's decision dated August 4, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a hearing was held in Council Bluffs, Iowa on September 9, 2011. Claimant participated personally. Participating as witnesses for the claimant were Mr. Robert Awe, Ameristar Surveillance Department Employee and Ms. Lillias Freeman-Hogan, Former Surveillance Employee/Supervisor. Employer participated by Ms. Alyce Smolsky, Hearing Representative, and witnesses: Mr. Trevor Grosvenor, Director of Surveillance, Mr. Dave Trumblee, Corporate Director of Surveillance, and Ms. Emilie Jones, Employee Relations Manager. Employer's Exhibits One, Two, Three, Four, Five and Six were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: John Smith was employed by Ameristar Casino Council Bluffs from June 5, 2008 until July 7, 2011 when he was discharged from employment. Mr. Smith held the position of full-time surveillance observer and was paid by the hour. His immediate supervisor was Phillip Condrey.

Mr. Smith was discharged based upon an incident that had taken place on July 4, 2011. On that date the claimant had neglected to log a call that had been made to a pit boss regarding an error on a table game. Ameristar Casino policy as well as state and federal regulations require that all inbound and outbound calls from the surveillance area be electronically logged in each day. Mr. Smith was aware of the job requirement and had demonstrated the ability to follow the call log-in requirements.

Because Mr. Smith had been warned and counseled in the past for failure to enter calls into the daily log as required by company policy and gaming regulations and because a number of

additional infractions had taken place since the warning, a decision was made to place the claimant on "management review." When an employee is placed on management review, Ameristar management reviews the circumstances and any extenuating circumstances and a decision is then made whether the claimant's employment with the casino will continue.

At the time that the claimant was informed that he was being placed on management review and the reason for it, Mr. Smith did not dispute the fact that he had neglected to enter the call into the log as required, nor did the claimant indicate any factual discrepancies about the allegation. Mr. Smith was informed of his right to request an internal appeal on the matter within three days but did not exercise his right to request an appeal until after the three days had elapsed.

After management reviewed the claimant's employment history and the circumstances of the most recent infraction, a decision was made to terminate Mr. Smith from his employment.

It is the claimant's position that he did not neglect to make required entries and that the employer is mistaken regarding the circumstances of the final incident that led to his discharge. It is the claimant's position that previous infractions documented by the employer should not have been considered, although he did not dispute them in writing when they occurred. It is Mr. Smith's further contention that as he believes the company does not follow all of its rules in all circumstances, the claimant's failure to follow a rule should not be disqualifying. It is the claimant's final contention that electronic entries sometimes disappear and the employer, therefore, has not sustained its burden of proof in showing that the entry was not made.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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.

The employer has the burden of proof in this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In this case Mr. Smith was discharged because on July 4, 2011, he observed a dealer error on a blackjack table and had notified the pit boss of the dealer's error by telephone. Mr. Smith was aware that company policy and state and federal regulations required him to log all calls in and out of the surveillance area, but the claimant did not do so. On November 5, 2010, Mr. Smith had received a written warning for failure to enter calls into the log and after the warning, a number of other instances had taken place in which Mr. Smith had not followed the required logging requirements. (See Exhibit One).

Although the incident had only taken place three days before and the claimant's omission was clearly described to him, the claimant did not dispute his failure to log the call or indicate in any manner the employer had made a mistake about the facts or circumstances of the issue. The claimant was also offered the option of requesting an internal appeal and review of his potential discharge within three days but did not exercise that right.

The administrative law judge is aware of the claimant's position that because not all company rules are followed, his failure to follow the rule in question should not be disqualifying. The administrative law judge finds the claimant's position untenable. The requirement that casino employees adhere to gaming regulatory requirements is of high importance to the employer because it may affect the employer's ability to continue doing business within the state. The claimant was aware of the rule, its requirements and the importance of the rule.

Mr. Smith also contends that he should have should not have been discharged because he did not agree with warnings that had been given to him. The evidence in the record does not show that the claimant filed any written disagreement with previous warnings. Past acts and warnings can be used to determine the magnitude of a current act of misconduct; however, whether the termination is disqualifying is based on the current act that caused the discharge. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Mr. Smith's final contention is that there was no omission made and that the log entry may have been electronically lost or deleted. The standard of proof in administrative proceedings is not that disqualifying conduct be established beyond a reasonable doubt, as in criminal law, the requirement is that the employer sustain its burden of proof by a preponderance of the evidence. The administrative law judge concludes that the employer has sustained its burden of proof in establishing that the log entry was not made as required. The administrative law judge notes that at the time of the allegation, Mr. Smith did not dispute his employer's allegation or claim or that it may have been electronically lost. The administrative law judge also notes that

in earlier statements to Iowa Workforce Development, Mr. Smith had maintained that he had “forgotten” to log in the call to the pit boss during the incident in question.

For the above-stated reasons the administrative law judge concludes that the claimant’s repeated failure to follow a known and required regulatory rule after being warned constitutes disqualifying conduct under the provisions of the Iowa Employment Security Law. Benefits are withheld.

DECISION:

The representative’s decision dated August 4, 2011, reference 01, is affirmed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs