IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VALERIE A (HADEN) HILZ
Claimant

AMERISTAR CASINO COUNCIL BLUFFS
Employer

APPEAL NO: 13A-UI-04375-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/17/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ameristar Casino Council Bluffs (employer) appealed a representative's April 4, 2013 decision (reference 01) that concluded Valerie A. (formerly Haden) Hilz (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was convened on May 20, 2013. The record was held open for the submission of an audio CD, admitted into the record as Employer's Exhibit One on May 22, 2013. The claimant participated in the hearing and presented testimony from one other witness, Andrea Poppino. Beth Crocker of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Ronda Huntley and Tammy Spearman. Based on the evidence, the arguments of the parties, 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on September 10, 2009. She worked full time as a count room supervisor. Her last day of work was March 21, 2013. The employer discharged her on that date. The reason asserted for the discharge was unacceptable job performance by failing to stop an unprofessional conversation between two subordinates.

On March 9 two of the claimant's subordinates, Poppino and a male coworker were working and talking together. The male related some skits from a comedian's show he had recently watched, and he did make some vulgar statements. Other comments were of a somewhat racial language. The two employees subsequently spoke about another male employee; part of their conversation regarding this male employee was of a sexual nature.

The employer's security team heard the conversation in an audit of the surveillance video and audio; on about March 13 they reported the conversation to Huntley, the count room manager. Poppino and the male employee were discharged for violation of the employer's anti-harassment policy.

The employer then discharged the claimant for failing to stop the conversation between the subordinates. The employer assumed that the claimant had been able to hear the conversation in part because shortly after the conversation began the claimant made an inquiry if the subordinates were being inappropriate, to which the male subordinate answered, "no." The statements which had been made immediately prior to the claimant's inquiry were by the male subordinate commenting about the comedian being "hilarious" and having done a skit about the founding fathers and women's equality. Later in the conversation, when the two subordinates were speaking about the other male employee, the claimant asked if they had met that male employee's sisters, and described that she had met one of the sisters. However, the conversation regarding the coworker immediately before the claimant's question was not of an inappropriate language, but was with regard to how that employee had toughened up since he first started his employment. The claimant made some conversation then about her car having problems.

The male employee and Poppino were working immediately in front of where the surveillance camera was located. The claimant was working at the counting machine which was about six feet away, but which is very loud. Poppino testified that the claimant did not participate in and could not hear the conversation she was having with the male employee except during the few minutes that the claimant did make comments, which was not when the offensive portion of the conversation was occurring. The claimant also denied that she had heard any of the conversation which would have constituted an inappropriate conversation under the anti-harassment policy.

REASONING AND CONCLUSIONS OF LAW:

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 § 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). The question 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the conclusion that the claimant failed to stop an inappropriate conversation between subordinates despite being aware of the conversation. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact did hear the portions of the conversation which might violate the employer's anti-harassment policy. 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 April 4, 2013 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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