

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JERRY J TOMASIEWICZ**  
Claimant

**APPEAL NO: 09A-UI-11508-DWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMERISTAR CASINO CO BLUFFS INC**  
Employer

**OC: 07/05/09**  
**Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

Jerry J. Tomasiewicz (claimant) appealed a representative's August 3, 2009 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Ameristar Casino Council Bluffs, Inc. (employer) would not be charged because he had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 26, 2009. The claimant participated in the hearing. Michelle Hawkins, a TALX representative, appeared on the employer's behalf. Amanda Lang and Emily Jones testified on the employer's behalf. 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:**

Did the employer discharge the claimant for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on June 28, 2005. The claimant worked as a full-time slot service specialist. During the claimant's employment he received information that the employer stressed teamwork and that the employer required employees to show respect and courtesy to co-workers.

During the claimant's employment, the employer gave him final written warnings on May 29, 2008, for making an inappropriate comment and on August 4, 2008 for physically moving a co-worker. On October 4, 2008, the employer talked to the claimant and another employee because they did not get along and created problems at work. After the employer had the October 4, 2008, counseling session, there were no further problems between the claimant and this employee.

On July 2, 2009, the claimant told a dispatcher that other team member did not like the way he dispatched. The dispatcher was on the radio when the claimant made the comment and may or may not have heard the claimant, but Lang heard the claimant's comment. Lang told the claimant to be positive and work as a team. Instead of refraining from saying anything else, the

claimant then made comments about the performance of other co-workers. Lang then suspended the claimant on July 2 for making negative comments about fellow employees.

The employer informed the claimant on July 10 that he was discharged for violating the employer's code of conduct or failure to work as a team member.

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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. 871 IAC 24.32(8).

The employer established business reasons for discharging the claimant. The claimant's comments or complaints about co-workers on July 2, does not rise to the level of work-connected misconduct. He may have used poor judgment when he did not report problems with other employees in a private setting, but his comments on July 2 do not establish an intentional or substantial disregard of the employer's code of conduct. Instead, reporting problems or concerns about other employees to a supervisor could promote teamwork by letting the supervisor know there are issues that need to be addressed. In this case, the claimant did not commit a current act of work-connected misconduct. Therefore, as of July 5, 2009, the claimant is qualified to receive benefits.

**DECISION:**

The representative's August 3, 2009 decision (reference 01) is reversed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. As of July 5, 2009, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise  
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs