

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**KAREN L WASCHKOWSKI  
1206 SILVER LN  
CARTER LAKE IA 51510-1211**

**AMERISTAR CASINO CO BLUFFS INC  
c/o EMPLOYERS UNITY INC  
PO BOX 749000  
ARVADA CO 80006-9000**

**Appeal Number: 06A-UI-05597-JTT  
OC: 04/23/06 R: 01  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Karen Waschkowski filed a timely appeal from the May 22, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 15, 2006. Ms. Waschkowski participated personally and was represented by her daughter, Betty Han. Rachael Thompson of Employers Unity/TALX UC eXpress represented the employer and presented testimony through Team Relations Coordinator for Human Resources Shila Kinsley, Production Chef John Nyholm and Sous Chef Jill Leppert. Exhibits One through Nine were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Karen Waschkowski was employed by Ameristar Casino as a full-time kitchen helper from May 23,

1996 until April 21, 2006, when Manager Mark Black suspended her pending possible discharge.

The final incidents that prompted the discharge occurred on April 16 and 17, when Ms. Waschkowski clocked in early for her scheduled shift. Ms. Waschkowski was scheduled to work at 8:00 a.m. on both days. On April 16, Ms. Waschkowski clocked in at 6:51 a.m. On April 17, Ms. Waschkowski clocked in at 6:54 p.m. The employer has a written policy that prohibits employees from clocking in more than seven minutes before the scheduled start of a shift. The purpose of the policy is to control labor costs, including overtime expense. Ms. Waschkowski was aware of the policy. On April 21, Ms. Waschkowski was summoned to a meeting to discuss her early clock-in times. At that time, Ms. Waschkowski asserted that Production Chef John Nyholm had given her permission to clock in early. Mr. Nyholm had not in fact given Ms. Waschkowski permission to clock in early. Instead, Ms. Waschkowski had merely mentioned the early clock-in to Mr. Nyholm a few hours after she clocked in early on April 17. Ms. Waschkowski told Mr. Nyholm, "I clocked in early today so I could make up the hours I was short from the weekend." Ms. Waschkowski had left work early with permission on April 16, the Saturday before Easter. Mr. Nyholm considered that it was too late to do anything about the early clock-in that had already taken place and told Ms. Waschkowski, "That's okay."

Ms. Waschkowski had received a reprimand in August 2005 for clocking in early on 14 days. Ms. Waschkowski believed it was necessary to clock-in early to perform her preparatory duties and expressed this at the time of the reprimand. Thereafter, the employer took steps to have another employee assist with the preparatory duties.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Waschkowski was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record indicates that Ms. Waschkowski exercised poor judgment in deciding to clock in early on April 16 and 17, in violation of the employer's clock-in policy. Though the decision to discharge Ms. Waschkowski was within the discretion of the employer, the conduct at issue does not rise to the level of substantial misconduct that would disqualify Ms. Waschkowski for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Waschkowski was discharged for no disqualifying reason. Accordingly, Ms. Waschkowski is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Waschkowski.

DECISION:

The Agency representative's decision dated May 22, 2006, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/cs