IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMANDA M HANSON
Claimant

IA GAMING CO
SC RIVERBOAT CORP
BELLE/SIOUX CITY RIVERBOAT
Employer

APPEAL NO. 08A-UI-00830-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12-30-07 R: 01
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 17, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 7, 2008. The claimant did participate. The employer did participate through Linda Carson, Human Resources Assistant, (representative) Barb Holsinger, Human Resources Director, and Diane Pilar, Loss Prevention Risk Safety Manager. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a valet supervisor full time beginning February 1, 2007 through January 2, 2008 when she was discharged.

The claimant was discharged because the employer believed that on or about December 8 the claimant violated her medical work restrictions by dancing in a bar after working hours. On December 8 the claimant had work restrictions due to a back injury that included no twisting, bending, squatting or lifting over five pounds and no pushing or pulling. After work on December 8 the claimant went out with some coworkers and attempted to dance. Her attempt to dance resulted in pain so she sat down and did not continue to dance. The employer contends that by attempting to dance the claimant violated her work restrictions.

Three of the claimant's coworkers provided the employer with statements that they allegedly saw the claimant dance in a way that violated her work restrictions. None of those employees testified at hearing, nor were their statements offered into evidence. No one who testified at the hearing saw the claimant dance on December 8 other than the claimant.

When the claimant was questioned about her activities on December 8 she admitted to the employer that she had attempted to dance and that it had hurt her so she stopped. While the claimant admitted it was probably not wise or prudent for her to attempt to dance, she did not admit attempting to intentionally violate her work restrictions or to violating her work restrictions. At hearing the claimant denied that her activities, including dancing on December 8, violated her work restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a

"wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. While the claimant admitted that it was not her wisest decision to attempt to dance, the administrative law judge cannot conclude that her actions constitute deliberate misconduct. While a person may have work restrictions, that does not mean they must do absolutely nothing while on their own time. This conduct was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. This is true when considering that none of the witnesses to the actual conduct testified at the hearing as to what exactly the claimant did to violate her work restrictions. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. Benefits are allowed.

DECISION:

The January 17, 2008, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs