

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DONALD R KREIN**  
Claimant

**APPEAL NO. 08A-UI-07364-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMERISTAR CASINO CO BLUFFS INC**  
Employer

**OC: 06/29/08 R: 01  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant appealed the August 12, 2008, reference 01, decision that denied benefits. The appeal hearing was initially set for August 27, 2008 at 1:00 p.m. On August 15, 2008, claimant's legal counsel submitted a request for discovery and attached interrogatories to be forwarded to the employer. On August 19, 2008, The Appeals Section forwarded the request for discovery and interrogatories to the employer. The August 27, 2008 appeal hearing was postponed to allow time for completion of discovery. The employer did not respond to the interrogatories. Instead, on September 15, 2008, attorney Gary R. Fischer entered a written appearance on behalf of the employer and submitted the following correspondence:

The purpose of this letter is to inform you that we have reviewed this matter and determined that Mr. Krein was terminated for unsatisfactory job performance but that conduct in this case did not amount to "misconduct" so as to deny Mr. Krein's unemployment benefits. Accordingly, Ameristar will not further resist Mr. Krein's efforts to obtain unemployment benefits nor will Ameristar participate in any upcoming hearing or other proceedings on this matter.

The matter was reset for hearing on October 8, 2008 at 11:00 a.m. The parties, and their respective legal counsel, were properly notified by hearing notice mailed on September 25, 2008. Mr. Krein participated personally and was represented by attorney Joseph Basque. The employer did not respond to the hearing notice and did not participate. The administrative law judge received Department Exhibit D-1, the September 15, 2008, correspondence from attorney Gary R. Fischer, into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Donald Krein was employed by Ameristar Casino Council Bluffs, Inc., as a full-time security officer from

October 2005 until July 23, 2008, when Supervisors Al Belcher and Brian Hemmer discharged him. The incident that prompted the discharge occurred during the early hours of the previous day, when an underage female gained entry to the casino by presenting a photo ID that belonged to another female family member. At the time Mr. Krein reviewed the ID, the male patron who accompanied the female in question engaged in conduct designed to distract Mr. Krein and prevent Mr. Krein from carefully reviewing the ID. Mr. Krein scanned the ID with a barcode scanner to discern whether the ID was for someone of legal age and scanned the ID with a black light to ensure the ID was not bogus. Mr. Krein glanced at the photo, did not note a difference between the person before him and the person in the photo. Mr. Krein admitted the female into the casino. The underage female was in the casino an extended time before another security guard reviewed the photo ID more closely and discerned she was not the person whose picture appeared on the ID.

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

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.

The employer has the burden of proof in a discharge 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 employer waived its participation at the appeal hearing and, thereby, failed to produce any evidence whatsoever to support the allegation that Mr. Krein was discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. Indeed, the employer indicated in the September 15, 2008, correspondence from attorney Gary R. Fischer that the employer no longer believed Mr. Krein had been discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. The evidence fails to establish that Mr. Krein intentionally disregarded the interests of the employer. The employer has failed to produce sufficient evidence to show that Mr. Krein was careless and/or negligent, rather than simply duped by the underage female and her male escort. Even if the evidence showed carelessness or negligence in connection with the final incidence, the evidence fails to establish any other incidents of carelessness or negligence. Disqualifying misconduct cannot be established. The administrative law judge concludes that Mr. Krein was discharged for no disqualifying reason. Accordingly, Mr. Krein is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Krein.

**DECISION:**

The Agency representative's August 12, 2008, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs