

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINA DILLAVOU
Claimant

APPEAL NO. 13A-UI-05650-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HARVEYS BR MANAGEMENT CO INC
HARVEYS CASINO RESORTS**
Employer

**OC: 04/21/13
Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Harvey's Casino Resorts (employer) appealed an unemployment insurance decision dated May 10, 2013, reference 01, which held that Christina Dillavou (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 18, 2013. The claimant participated in the hearing. The employer participated through Vicki Broussard, Human Resources Generalist. Employer's Exhibits One through Seven were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time beverage server from May 1, 2007 through April 19, 2013 when she was discharged pursuant to the employer's progressive disciplinary policy. She received a note to her file on January 15, 2012 for inappropriate language on the floor. A written warning was issued to the claimant on November 3, 2012 for violation of three code of conduct standards when she was unprofessional with her co-workers. A second note was placed in her file on February 8, 2013 for rumors and gossip. The employer directed the claimant not to discuss other server's personal lives.

A final written warning was issued on March 4, 2013 for only scoring 80 points on an external spotlight conducted on February 9, 2013. The employer uses a third party company to hire "secret shoppers" who rate and review employees on their customer service. Employees are rated on five categories including: 1) welcome; 2) upbeat and positive attitude; 3) delight the guest; 4) farewell; and 5) overall interaction rating. The secret shopper includes identifying information on the external observation form to confirm the employee's identity. A perfect score is 150 and employees are required to at least meet the 100 point minimum on the spotlights.

The warning advised the claimant that she would be subject to the next step in the disciplinary process if she scored below 100 points.

The claimant was aware of what was required and scored 150 points on a spotlight conducted on April 5, 2013. However, she was subsequently discharged after she failed to meet the 100 point minimum requirement on a spotlight conducted on April 13, 2013. The claimant received a score of 90 after failing to thank the customer for the order or deliver any kind of parting remark. The secret shopper indicated, "After she delivered my drink, she simply smiled and walked away." It was reported the claimant did not "convey an especially upbeat or positive attitude" and "did not do anything to personalize the interaction or make it stand out."

The claimant filed a claim for unemployment insurance benefits effective April 21, 2013 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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 to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on April 19, 2013 for violation of her final written warning. She failed to meet the minimum 100 points on a spotlight external observation. The claimant contends she did her job to the best of her ability and that her actions were not misconduct. However, she knew what was required, knew her job was in jeopardy and knew that failing to thank a customer for an order was not acceptable, regardless of whether it was a spotlight customer or not. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. Benefits are therefore denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated May 10, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css