IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANDREA F POPPINO
Claimant

AMERISTAR CASINO CO BLUFFS INC
Employer

APPEAL NO. 13A-UI-05119-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/07/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ameristar Casino Council Bluffs filed a timely appeal from a representative's decision dated April 22, 2013, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 5, 2013. The claimant participated personally. Participating as a witness for the claimant was Valarie Haden, former co-employee. The employer participated by Ms. Beth Crocker, Hearing Representative and witnesses, Ms. Tammy Spearman, Team Relations Manager and Ms. Ronda Huntley, Counting Room Manager. Employer's Exhibits One, Two, Three, Four, Five, Six and Seven were received into evidence.

ISSUE:

The issue in this matter is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Andrea Poppino was employed by Ameristar Casino Council Bluffs from January 24, 2006 until March 21, 2013 when she was discharged from employment. Ms. Poppino was employed as a full-time count room lead person and was paid by the hour. The claimant's supervisor was Valarie Haden. Ronda Huntley was the area manager.

A management decision was made to discharge Ms. Poppino and others after a video surveillance audit review for March 9, 2013 was reviewed. The employer believed that the review showed that the employees were engaging in too much banter and conversation about recent comedians act and making comments with sexual innuendos about a male employee rather than devoting sufficient time to calling out "empty" and showing empty ash canisters to other employees to validate that they were empty.

Although when interviewed Ms. Poppino indicated that she did not remember the conversation and had not actively engaged in it, it was the employer's belief that the claimant as a "lead person" had an obligation to stop the conversation and encourage other workers to pay more

attention to their duties. Count room employees had been given additional training about the company's anti-harassment policies on January 27, 2012 and company employees had been urged to not engage in inappropriate comments and to display positive attitudes at work.

Ms. Poppino did not actively engage in the conversation that casino management believed to be inappropriate and was generally unaware that the conversations were taking place.

It is not unusual for count room employees to engage in banter among themselves and employees continued to display that the cash canisters were empty to the video security cameras and to designated other employees as each canister was empty as they continued to visit.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. 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.

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 the claimant but whether the claimant is entitled

to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes conduct justifying termination of an employee and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge may not necessarily be serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based upon carelessness the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature.

In the case at hand it appears that Ms. Poppino was one of a number of individuals working in the casino's counting room. The evidence establishes that it was not unusual for various members of the group to engage in banter as they worked and routine audits of other activities that were of a similar nature had not resulted in warnings or disciplinary actions. On the day in question some of the employees were bantering about a comedian who had appeared and were apparently making joking comments indicating matter to or about one of their workers. Because the subject had been previously addressed in sexual harassment retraining, Casino management believed that the conduct that they viewed was inappropriate.

The evidence in the record does not establish that Ms. Poppino was sufficiently aware of the conduct of the other employees or sufficiently a participant in that conduct to be in intentional disregard of her employer's interest or reasonable standards of behavior. Although the claimant had received a warning in June of 2012 about making negative comments about management, the evidence in the record does not establish that the claimant intentionally violated the terms of the warning or company policy on March 9, 2013 or that there was any intervening act of current misconduct on the part of the claimant between the date that the employer was aware of the incident on March 9, 2013 and her discharge 12 days later. Unemployment insurance benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated April 22, 2013, reference 01, is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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