

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLAS HORAK
Claimant

APPEAL NO: 11A-UI-10395-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERSIDE CASINO AND GOLF RESORT
Employer

**OC: 07-10-11
Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 29, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 31, 2011, and continued October 10, 2011. The claimant participated in the hearing with Representative David Greene. Trisha Semelroth, Human Resources Business Partner; Jodee Radosevich, Table Games Director; Doug Thelen, Table Games Shift Manager; Kerry Trygg, Assistant Shift Manager; and Tim Donovan, Human Resources Director, participated in the hearing on behalf of the employer. Employer's Exhibits One through Ten were admitted into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time table games dealer for Riverside Casino and Golf Resort from August 21, 2006 to July 6, 2011. On May 3, 2009, the claimant received a written warning for poor game protection and customer service after customers complained the claimant was ignoring them and was watching television. On October 28, 2009, the claimant was specifically told his job was in jeopardy if his job performance did not improve. On March 19, 2010, he received a written coaching for poor game protection. On December 31, 2010, the claimant received a reminder slip for throwing money at a customer, which is considered rude and unprofessional under any circumstances, and for touching the computers which dealers are not allowed to do (Employer's Exhibit Five). On April 7, 2011, the claimant received a final written warning after he "failed to remove all cards from his discard rack, leaving behind one card. This resulted in an extra card of a different color getting placed into the wrong deck, which in turn compromises the integrity of the game. As a dealer your priority is to protect the game at all times" (Employer's Exhibit Ten). The Surveillance Observation Report stated the claimant "left a card in the discard rack during the shuffle process. On the next shuffle, the card was mixed in with a different colored pair of decks. The error was not found until one shoe was dealt with the

decks which were missing the card” (Employer’s Exhibit Ten). On April 13, 2011, the claimant received a reminder slip for allowing a customer to come behind the table to pick up a card or chip the claimant dropped on the floor (Employer’s Exhibit Four). On May 3, 2011, a Surveillance Observation Report stated, “The dealer was observed coloring up \$30 in tokens without a supervisor present and not immediately dropping the green cheque. The green cheque remained by the discard rack until 6:37 p.m. when a total of \$59.50 in tokens were colored up and dropped in the token box (Employer’s Exhibit Nine). On June 10, 2011, two Surveillance Observation Reports were generated regarding the claimant’s actions (Employer’s Exhibits Seven and Eight). The first one occurred when the claimant was “observed paying a two color bet without breaking down the original bet. He was also observed ‘tossing/throwing’ payoffs instead of sizing into the original bet (Employer’s Exhibit Seven). Additionally, on the same date, the claimant was “observed failing to acknowledge a push on spot 3. Both the dealer and the player at spot 3 had a 20, and no motion was made by the dealer to denote the push. This was also observed on several other occasions” (Employer’s Exhibit Eight). On June 14, 2011, the claimant “was observed not making a ‘no more bets’ signal before dealing the cards. In that same hand he was also observed not making a proper sweeping motion over the insurance line to end insurance betting (Employer’s Exhibit Six). The final incident occurred June 29, 2011, when the claimant was on a table with three guests and called the supervisor over. He was changing money at the time but was looking around the casino and surveillance showed the claimant looking in both directions. He told the supervisor that another table was “dead” and he wanted the supervisor to close that table so he could be sent home. While he was doing that he was supposed to be changing cash into chips for a player and during the time he was looking around the casino he was ignoring the players and had his back turned which is considered poor game protection as he was away from the discard rack and close to the end of the table. The guest was waiting for his change and when the claimant handed off his chips he did not look at the guest because he was looking around the casino. He set the chips down and when he did look down he had left one chip behind and tossed the chip to the guest which is “absolutely forbidden” by the employer. On the claimant’s way back from break his supervisor attempted to give him a reminder slip about his conduct and the claimant refused to sign it (Employer’s Exhibit Three). The reminder slip stated, “Please remember to have proper game protection when dealing on BJ4, you should not be watching down the pit let alone calling for a floor supervisor to let them know” another table “is dead and it would be a good idea to close it because you ‘would really like to go home’” (Employer’s Exhibit Three). The employer investigated the incident and terminated the claimant’s employment July 6, 2011, for poor guest service and poor table and game protection.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant received at least seven reminder slips and surveillance observation reports between December 31 and June 29, 2011, in addition to receiving a written coaching, a written warning and a final written warning. He failed to provide the level of customer service expected by the employer and repeatedly failed to protect the game and table. He knew, or should have known, that his job was in jeopardy due to his actions and behavior in violation of the employer's policies. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The July 29, 2011, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css