

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROY SMITH, JR
Claimant

APPEAL NO: 06A-UI-10925-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

**OC: 10-15-06 R: 01
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 30, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 29, 2006. The claimant participated in the hearing. Christine Adams, Human Resources Manager; Patty Reeves, Heritage Buffet Manager; and Gale Palmer, Employer's Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five 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 food server for Ameristar Casino from July 7, 2003 to October 3, 2006. On September 29, 2006, another employee encountered a guest in the restroom who was crying, shaking and very upset. She asked the guest what was wrong and the guest, who used a cane to walk and was a regular customer, stated that the claimant continually badgered and harassed her by saying if she would just go to church and revival and pray she could walk without her cane. The employee reported the situation to her supervisor who spoke to the guest and confirmed the employee's account of the events and told Heritage Buffet Manager Patty Reeves about the incident. Ms. Reeves called the guest and the guest said the claimant upset her every time she came in to the point she had to see her doctor and he suggested she not go to the buffet. The guest did not return to the buffet until September 29, 2006, at which time she asked not to be seated in the claimant's section but he pursued her wherever she was seated and made the same comments that upset her before. The employer placed the claimant on management review September 29, 2006, and the decision to terminate his employment was made. He challenged the decision with the general manager who upheld the termination as did the peer review committee. The claimant received a final written warning August 26, 2006, for telling a co-worker if she gave him 10 percent of her tips he would give the money to his church and pray for her and she would make more tips. The warning stated he must refrain from discussing religion during work. The behavior continued however, and other

employees complained that the claimant pushed his religion on them and often loudly sang religious songs at work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant's actions toward the guest September 29, 2006, were unprofessional and inappropriate at best and the fact he continued to harass her by telling her she would not need her cane if she simply went to his church and revival and prayed is unconscionable in his position as an employee. The guest tried to avoid him but he sought her out even when she specifically requested not to sit in his section. Additionally, the claimant discussed his religion at work on a regular basis and told another server that if she gave him 10 percent of her tips for his church he would pray for her and she would make more in tips. While the claimant denies the allegations involving the guest and testified the other employee initiated the conversation about religion August 26, 2006, the employer's testimony and the guest's statement are credible.

Consequently, 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). Benefits are denied.

DECISION:

The October 30, 2006, reference 01, decision is affirmed. 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs