

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN D BARTHEL
Claimant

IOC BLACK HAWK COUNTY INC
Employer

APPEAL 18A-UI-04759-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/25/18
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 12, 2018, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 11, 2018. Claimant participated. Employer participated through human resources manager Tori Jermeland. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a security officer from September 11, 2017, and was separated from employment on March 23, 2018, when he was discharged.

The employer has a written policy that requires security officers to check an individual's ID, compare the features to the person presenting the ID, and only allow individuals that are 21 years old or older on the gaming floor. Security officers are required to check an individual's ID if they look 35 years old or younger. If a security officer suspects there is an issue with the ID, they are required to contact a supervisor. The supervisor then reviews the ID and makes the determination on whether or not the individual can access the gaming floor. If a security officer allows an individual that is under 21 years old on the gaming floor, they may be discharged, even for a first offence. Claimant was aware of the policies.

On March 23, 2018, during claimant's scheduled shift, he was working the turnstiles (which is where security officers check IDs) when a female approached to gain access to the gaming floor. Claimant requested the female's ID. The female presented the claimant with a driver's license. Claimant scanned the driver's license and confirmed it was not a fake ID. When claimant scanned the driver's license, it indicated the individual was 33 years old. Claimant looked at the driver's license the female presented. The female was using a different person's driver's license, which indicated that she was 33 years old. The female was actually 18 years old. Claimant was not aware that the female was only 18 years old. Claimant asked the female a couple of questions from the driver's license. The female correctly answered the questions. After reviewing the driver's license the female presented, claimant allowed the female to enter the gaming floor. At some point after accessing the gaming floor, the female left the gaming floor. Later on March 23, 2018, the same female returned to the turnstiles to gain access to the gaming floor. Claimant was still working the turnstiles and reviewed the female's driver's license again. Claimant recognized that the female had been on the gaming floor previously, but he still checked her ID. The female again presented someone else's driver's license, which indicated she was 33 years old, even though she was only 18 years old. After reviewing the driver's license, claimant allowed the female to access the gaming floor. At some point after accessing the gaming floor, the female again left the gaming floor. Later on March 23, 2018, the same female returned to the turnstiles to enter the gaming floor again. Claimant had left the turnstiles at this time and a different security officer was working the turnstiles. This security officer requested the female's ID. The female presented the same driver's license she had presented the first two times, which indicated she was 33 years old. This security officer called a supervisor. The supervisor questioned the female and discovered she was only 18 years old. The employer then started an investigation. Ms. Jermeland reviewed the surveillance video and was able to see the female and the driver's license she presented on the surveillance video. Ms. Jermeland testified the female's weight, height, and facial features did not match the driver's license the female presented. Claimant testified that sometimes a person's features (weight, hair color, etc.) may change since they obtained their ID and that is why he asked the female questions. The employer observed claimant allowing the female on the gaming floor twice after reviewing the ID the female presented. Later, claimant's manager called him and informed him he was discharged. Claimant told his supervisor that he did not know he let an underage person on the floor. Claimant did not have any prior disciplinary warnings for similar incidents (letting underage individuals on the gaming floor).

The employer usually receives a fine if it allows an underage person on the gaming floor. The employer also has to go before the State of Iowa and explain the measures they are taking to prevent it from happening again. The employer may lose its gaming license if there are too many violations. Claimant needed a gaming license to work for the employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App.

1988). A warning weighs heavily toward a finding of intentional conduct. Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Claimant provided credible, first-hand testimony, that he reviewed the driver's license that the female presented. Claimant also credibly testified he questioned the female about the driver's license and the female correctly answered the questions. Furthermore, the employer had the power to present the surveillance video from the incident showing the female and how clear the driver's license could be observed as evidence, but the employer instead chose to rely on Ms. Jermeland's testimony about what she observed. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

Claimant presented sufficient and credible evidence that he followed the employer's procedures on March 23, 2018 when he checked the female's driver's license. Claimant further presented sufficient evidence that he took reasonable steps to check the female's driver's license, including asking the female questions about the driver's license, prior to letting her access the gaming floor. Although claimant may have made a good faith error in judgment allowing the female on the gaming floor, he did not intentionally allow an underage female on the gaming floor. Iowa Admin. Code r. 871-24.32(1)a ("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."). Benefits are allowed.

Furthermore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The April 12, 2018, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs

NOTE TO EMPLOYER:

If you wish to change the address of record, please access your account at:

<https://www.myiowau.org/UIIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and

http://www.youtube.com/watch?v=_mpCM8FGQoY