

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH PROST
Claimant

APPEAL NO. 10A-UI-04733-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AMERISTAR CASINO
COUNCIL BLUFFS INC**
Employer

**Original Claim: 01/31/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated March 16, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits based upon his separation from Ameristar Casino Council Bluffs, Inc. After due notice was issued, a telephone hearing was held on May 12, 2010. The claimant participated personally. The employer participated by Tom Kuiper, hearing representative, and witnesses Emily Jones and Randall McQueeney, operations tech manager. Employer's Exhibits One through Four were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

The claimant was employed by Ameristar Casino Council Bluffs, Inc. from May 2, 2009, until February 5, 2010, when he was discharged from employment. Mr. Prost held the position of full-time Slot Machine Technician II and was paid by the hour. His immediate supervisor was Randall McQueeney.

The claimant was discharged when the employer believed that he was using company equipment to look for other jobs. The employer investigated a complaint by another worker that Mr. Prost was looking for other jobs using the company's internet/electronic equipment at work to do so. Under company policies, the use of the internet for personal use is not allowed. The results of the investigation by the employer show that Mr. Prost had visited websites used by other electronic technician workers. Based upon a small number of comments that were of a general nature made by Mr. Prost, the employer believed that the claimant had been laying the groundwork for applying for jobs. Mr. Prost had not previously been warned for violation of the company's electronic or telecommunication policies. The claimant had been warned in the past for being unproductive during work time, however.

It is the claimant's position his access to the sites in question was made solely as a source of information for the electronic work that he was performing for the company and that he did not make any application or seek employment. Mr. Prost did not consider the time spent on these endeavors to be unproductive, because the purposes was work-related and for the benefit of the company.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional 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 this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current. See 871 IAC 24.32(8).

The question before the administrative law judge in this case is not whether the employer has a right to discharge Mr. Prost for these reasons, but whether the discharge is disqualifying under the provisions of the Employment Security Act. The claimant has supplied a reasonable explanation for his access to internet sites that had a relation to his work, and the evidence in the record does not establish he was applying for new employment. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, sufficient evidence of intentional disqualifying conduct has not been shown. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 16, 2010, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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