

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 06A-UI-07704-BT
OC: 07/02/06 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

871 IAC 26.14(7) - Late Call
§ 17A.12-3 - Non-Appearance of Party
Section 96 5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Joy Infante-Campbell (claimant) appealed an unemployment insurance decision dated July 28, 2006, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Diamond Jo Casino (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 17, 2006. The claimant participated in the hearing with Attorney Ronald Wagenaar. Law Clerk Rashawn Logan observed the hearing with Attorney Wagenaar. The employer did not comply with the hearing notice instructions and did not call in

to provide a telephone number at which a representative could be contacted and, therefore, did not participate.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time supervisor from March 17, 2006 through May 18, 2006, when she was discharged after she lost her gaming license. A gaming license was a condition of employment and the claimant's was taken after the background check was completed. Except for a traffic ticket, the claimant had not been charged or convicted with any crime committed between her date of hire and the termination date. There had been a criminal charge for a bad check in 2005, but the claimant reported she disclosed this at the time of hire.

The employer received the hearing notice prior to the August 17, 2006 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The employer contends it called the Appeals Section to report its telephone number on August 8, 2006, but the employer had no control number and there is no record of the employer's call. The employer requested that the hearing be reopened.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied. If a party responds to a hearing notice after the record has been closed, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c).

The first time the employer called the Appeals Section for the August 17, 2006 hearing was after the record had been closed. Although the employer may have intended to participate in the hearing, that is not the determining factor when evaluating whether good cause exists to reopen the record when a party fails to participate. The employer did not establish good cause to reopen the hearing. Therefore, its request to reopen the hearing is denied.

The next issue to be determined is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant was discharged because she lost her gaming license which was a requirement of the job. However, her license was lost as a result of criminal charges that occurred in 2005. 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 on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

The employer is not a base period employer and its account is not subject to any charges during the claimant's current benefit year. If the claimant establishes a subsequent benefit year, the wage credits she earned from March 17, 2006 through May 18, 2006 would be subject to charge since the employer discharged her for non-disqualifying reasons.

DECISION:

The unemployment insurance decision dated July 28, 2006, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

sda/cs