

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANN HICKEY
Claimant

APPEAL NO: 08A-UI-11381-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

OC: 10-12-08 R: 01
Claimant: Respondent (2-R)

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 November 25, 2008, 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 December 17, 2008. The claimant participated in the hearing. Misty Sessions, Slot Operations Manager; Emily Jones, Team Relations Manager; and Marty Young, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibit One was 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 slots service specialist for Ameristar Casino Council Bluffs from July 1, 1996 to August 19, 2008. She was discharged for neglect of job duties and inconsistent performance. On November 25, 2006, she received a written warning for inconsistent job performance because she displayed a negative demeanor, was visibly agitated and was complaining about her floor assignment. On November 14, 2007, the employer held a one on one sit down counseling session with the claimant to discuss her performance during the previous month and her negative attitude (Employer's Exhibit One). The claimant agreed and said she would get "flustered" sometimes but was working on achieving her performance goals. The claimant's performance improved substantially after the one on one until May 6, 2007, when she received a written warning for displaying an unfavorable attitude toward other employees and within earshot of customers when checking into work, rolling her eyes and slinging papers around (Employer's Exhibit One). On December 8, 2007, the claimant received a final written warning for displaying a negative demeanor toward guests after a guest stopped the claimant to ask for assistance as she was on her way to break and the claimant threw her arms up in the air and said she would not help him because she was going to break (Employer's Exhibit One). The employer told the claimant she was not promoting the atmosphere the employer strives to provide for its guests. On February 12, 2008, the employer held a one on

one discussion with the claimant to discuss her behavior after the employer observed her walking in and out of the banks but noted that her floor was well maintained (Employer's Exhibit One). It spoke to her about her overall performance including the proper use of the radio and communicating with team members and leadership when stuck in one area with other lights going on around her (Employer's Exhibit One). On February 25, 2008, she received a verbal warning and improvement coaching for her technical performance involving repairing machines, fixing ticket jams and bill validators (Employer's Exhibit One). The claimant trained with a technical training partner on two occasions but did not perform consistently in the technical areas of her job. On March 10, 2008, the employer held a one on one with the claimant and talked to her about the team goals as well as her personal goals and her technical skills (Employer's Exhibit One). On March 30, 2008, the claimant received a verbal warning for failure to maintain the proper attitude throughout her shift after she walked by a group of employees without greeting or acknowledging them (Employer's Exhibit One). The claimant agreed to be courteous and responsive and to sustain her guest services performance. On April 16, 2008, the claimant received a written warning due to her technical skill set after she told a manager to pay a guest who won \$1,600.00 because otherwise it would deplete the claimant's wallet (Employer's Exhibit One). It was the claimant's job to make the payout and she had done it many times before but this time she made the guest wait 17 minutes for the payout instead of simply paying the guest and then making a buy from the cashier if necessary (Employer's Exhibit One). On May 11, 2008, the employer held a one on one with the claimant and reviewed her goals from the previous one on one (Employer's Exhibit One). The employer gave the claimant examples of how to answer the radio and told her she was meeting the transaction goal of three minutes (Employer's Exhibit One). On June 15, 2008, the employer held a one on one with the claimant and told her she was six seconds over the completion goal of three minutes (Employer's Exhibit One). The employer stated they had talked about the claimant's performance in the past, including her technical skills and maintaining an upbeat attitude (Employer's Exhibit One). On June 23, 2008, the employer spoke to the claimant about the bill validator issue (Employer's Exhibit One). The claimant spent 10 minutes trying to fix a machine while a guest waited instead of calling a technician right away as she had done in the past (Employer's Exhibit One). The claimant was regularly exceeding the three to four minute goal of fixing a machine after previously meeting those goals (Employer's Exhibit One). The employer also discussed with the claimant that she was taking too long to do common tasks such as making change and told the claimant she was not consistent (Employer's Exhibit One). On July 1, 2008, the claimant received a final written warning for ineffective radio communication after she failed to listen to or respond to calls, displayed her frustration at being overwhelmed on the floor over the radio and spent too much time trying to fix machine malfunctions (Employer's Exhibit One). On August 19, 2008, the claimant was suspended pending management review because she called technical services several times August 12, 2008, regarding common issues she could have taken care of herself. She also left the floor unattended when she went to take paperwork to the dispatcher (Employer's Exhibit One). The employer had talked to the claimant the previous week about leaving the floor unattended (Employer's Exhibit One). The employer made the decision to terminate the claimant's employment because she failed to show immediate and sustained improvement. The claimant agreed that she sometimes had an attitude problem about work and that she tried to improve her attitude by talking to guests and thinking of what she could do on the technical side. She tried to push the negative attitude out of her mind and put a smile on her face while she walked around her area. The claimant basically agreed with her warnings and did not pursue her options with regard to her termination such as a management or peer review because she agreed with the warnings and that her performance was inconsistent.

The claimant has claimed and received unemployment insurance benefits since her 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 two verbal warnings, three written warnings, two final written warnings and five one on ones covering her attitude and job performance between November 25, 2006 and August 19, 2008. The claimant's performance usually improved after she received a warning but then she would backslide into her previous patterns of attitude and behavior. The fact that her performance did improve following warnings indicates that she was able to perform the job when she was motivated to do so. 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). 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 November 25, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. 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/pjs