IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAMELA M WOODRUFF
Claimant

AMERISTAR CASINO COUNCIL BLUFFS
Employer

APPEAL NO. 07A-UI-01282-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/31/06 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ameristar Casino Council Bluffs (employer) appealed a representative's January 24, 2007 decision (reference 01) that concluded Pamela M Woodruff (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 20, 2007. The claimant participated in the hearing. Kellen Anderson of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Shila Kinsley and Junior Pura. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 24, 2000. Since approximately 2005 she worked full time as a slot attendant in the employer's Council Bluffs, Iowa casino. Her last day of work was January 2, 2007. The employer suspended her that day and discharged her on January 3, 2007. The reason asserted for the discharge was unexplained variances.

On October 23, 2006 the employer gave the claimant a warning designated as a final warning, due to a $100.00 variance, which indicated that "continued behavior may result in additional actions pursuant to the coaching policy." The variance most likely occurred when the claimant dropped and spilled her cash wallet on the floor and regathered what she believed was all the money but failed to call a manager for assistance. Under the policy, a single unexplained variance of $100.00 or more results in a final warning. The policy does not specify what might trigger discharge after a final warning, but the employer asserted the claimant was advised that if there were even any unexplained variances of more than $20.00 within any 30-day period, the lowest threshold for disciplinary action, it would result in discharge.

On December 5 the claimant's wallet was short $1.00. On December 9 her wallet was short $10.20, possibly due to a ticket that was not printed. On December 29 her wallet was short $20.00. On December 31 it was short $40.00. Therefore, for the month of December she had an unexplained variance of $71.20. She had only been aware of the December 9 variance until January 3. She denied any knowledge as to what happened to cause the variances. The employer had not determined the cause of the variances and had not sought to track any of the claimant's transactions for the days in question.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the amount of her unexplained variances in the month of December 2006 after the warning for the $100.00 variance incident in October 2006. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to exercise proper care to avoid the variances. Under the circumstances of this case, the claimant's failure was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was due to good faith errors in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's January 24, 2007 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw