

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELIZABETH J BARNES

Claimant

**HARVEYS IOWA MANAGEMENT CO INC
HARRAHS COUNCIL BLUFFS CASINO**

Employer

APPEAL NO: 10A-UI-01621-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/03/10

Claimant: Appellant (2)

Section 96.5-2-a - Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The claimant appealed a department decision dated January 22, 2010, reference 01, that held she was discharged for misconduct on December 3, 2009, and benefits are denied. A telephone hearing was held on March 11, 2010. The claimant participated. Tanya Achenbach, HR Generalist, and Patricia McCabe-Clark, Operations Manager, participated for the employer. Employer Exhibits One through Eight was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on June 12, 2007, and last worked for the employer as a full-time server on November 27, 2009. The claimant received an employee handbook that contained the policies of the employer.

The employer issued a final warning to the claimant and suspended her from employment at the end of her work shift on November 26 that occurred about 12:30 a.m. on the November 27. The claimant was discharged on December 3 for job performance issues and violation of policy. Operations Manager Grobe issued the final warning to the claimant for violation of the employer well-time policy (three minutes or less) based on a November 22 incident, and suspended her based on a report from co-workers she was being condescending and antagonistic. The employer termination statement references incidents and claimant conduct that occurred on November 20 and 27.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

The administrative law judge concludes the employer has failed to establish that the claimant was discharged for a current act of misconduct in connection with employment on December 3, 2009.

The employer witnesses in this hearing were not directly involved in the investigation or final series of discipline issued to the claimant. The employer did not offer any witness or statement from a server that claimant was acting condescending or antagonistic that is behavior the claimant denies. Operations Manager Grobe did not participate in this hearing, and based on his employer documentation it is not discernible whether there is any incident or conduct by the claimant after she was suspended that is a violation or policy or job performance issue. The claimant offered credible testimony that she was issued a final warning and suspended at the

end of her November 26 work shift at 12:30 a.m. (early morning hour of November 27), and did not work again until discharge.

DECISION:

The department decision dated January 22, 2010, reference 01, is reversed. The claimant was not discharged for a current act of misconduct on December 3, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css