

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDRE L SIMMONS
Claimant

APPEAL NO. 11A-UI-04104-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HARVEYS BR MANAGEMENT CO INC
HARVEYS CASINO RESORTS**
Employer

**OC: 02/20/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Andre Simmons filed a timely appeal from a representative's decision dated March 18, 2011, reference 01, which denied unemployment insurance benefits based upon his separation from Harveys Casino Resorts. After due notice, a hearing was held in Council Bluffs, Iowa, on May 5, 2011. Claimant participated personally. Although duly notified the employer did not respond to the notice of hearing and did not participate.

ISSUE:

The issue is whether the evidence in the record establishes that the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Andre Simmons was employed by Harveys Casino Resorts from February 2006 until February 20, 2011 when he was discharged from employment. Mr. Simmons worked as a full-time table games dealer and was paid by the hour plus gratuities. His immediate supervisor was Rolland (last name unknown).

Mr. Simmons was discharged on February 20, 2011 after a patron had complained that Mr. Simmons had been rude and had removed playing cards from the patron's hands in an abrupt manner. After the complaint was received by management, Mr. Simmons was called to the company offices and questioned. At that time Mr. Simmons denied being rude and also denied taking the cards from the patron's hands in a rough manner or being abrupt. The claimant explained that the patron had refused to place his cards down as required for the table game that was being conducted and that after a number of requests Mr. Simmons simply placed the cards down so that the game could proceed. Because the claimant had been previously warned, a decision was made to terminate Mr. Simmons from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is 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 insurance benefits. Misconduct that serious enough to warrant a discharge of an employee may not necessarily be 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 Ct. 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 act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

In this matter the claimant appeared personally and testified under oath denying that he intentionally acted in a rude or abrupt manner with the patron in question. Mr. Simmons testified that he was merely attempting to proceed with the table game that he was dealing and that he placed the cards of the patron down on the table after the patron did not respond to several requests. The claimant denied being abrupt or rude while doing so.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for this reason but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Mr. Simmons may have been a sound decision from a management viewpoint, there is not sufficient evidence in the record to establish disqualifying misconduct. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 18, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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