

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

BECKY L LONG
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COUNCIL BLUFFS IA 51501-8740

AMERISTAR CASINO CO BLUFFS INC
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 06A-UI-03173-JTT
OC: 02/26/06 R: 01
Claimant: Respondent (1)

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)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Ameristar Casino filed a timely appeal from the March 13, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 31, 2006. At the scheduled time of the hearing, Claimant Becky Long was not available at the telephone number she had provided for the hearing and did not participate. Rachael Thompson of Employers Unity represented the employer and presented testimony through Human Relations Coordinator Shila Kinsley. Exhibits One through Eighteen were received into evidence.

The claimant contacted the administrative law judge after the record was closed, but failed to provide good cause to reopen the record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Becky Long was employed by Ameristar Casino as a full-time count room clerk from July 10, 2003 until February 27, 2006, when she was discharged for excessive absences.

The final absence that prompted the discharge occurred on February 23, 2006. Ms. Long was scheduled to work at 4:30 a.m. At no later than 2:50 a.m., Ms. Long telephoned the security dispatch department to notify the employer that she would be absent due to illness. Later that morning, Ms. Long contacted the employer that she would need to be absent the following day due to illness.

The employer has a written attendance policy that is set forth in an employee handbook, a copy of which was provided to Ms. Long. Under the policy, the employer considers absences incurred within the previous 12-month rolling period when disciplining employees under its progressive discipline policy. Under the policy, Ms. Long was required to notify the employer at least two hours prior to the scheduled start of her shift if she needed to be absent. Given the Ms. Long's early start time, the employer had directed her to contact the employer's Security Dispatch department to notify the employer of her need to be absent. It is a Security Dispatch department's policy to document the time and date of telephone calls from employees. The employer did not present testimony from Security Dispatch department personnel or the Security Dispatch department's original documentation of the call from Ms. Long on February 23, 2006.

The employer had issued a written reprimand to Ms. Long in connection with each prior absence. Ms. Long's absences in 2006 were as follows. Ms. Long was absent for her shift on January 23 and notified the employer the evening before that she lacked a babysitter and would be unable to come to work. On February 17, Ms. Long notified the employer at 3:20 a.m. that she would be absent due to illness for her shift and was scheduled to start at 4:00 a.m. Ms. Long advised the employer she was experiencing chest pains.

Ms. Long's absences during 2005 were as follows. On January 19, Ms. Long notified the employer at 1:47 a.m. that she would be absent due to illness for her shift that was scheduled to begin at 3:00 a.m. Ms. Long was not again absent or tardy until August 12, when she was tardy approximately 1½ hours due to oversleeping. On September 1-4, Ms. Long was absent due to illness promptly reported to the employer and provided a doctor's note. On October 9, Ms. Long was tardy approximately 2½ hours due to oversleeping. On December 11, Ms. Long was tardy by several hours.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Long was discharged for misconduct in connection with the employment. It does 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.

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 of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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 the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Ms. Long's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to

discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The question regarding Ms. Long's final absence is whether Ms. Long notified the employer an hour and 40 minutes prior to the scheduled start of her shift, as reported by the Security Dispatch department, or whether Ms. Long properly notified the employer at least two hours prior to the scheduled start of her shift, as required by the employer's policy. In other words, the determination of whether the final absence was an excused or unexcused absence comes down to a 20-minute discrepancy. The administrative law judge concludes that the employer has failed to provide available direct and satisfactory evidence regarding the time of Ms. Long's telephone call to the employer on February 23, 2006. The employer has not been able to determine who took the call on behalf of the employer. The employer failed to present any testimony from the Security Dispatch department, and failed to present original documentation of the call. Under the circumstances, the administrative law judge concludes that the evidence presented by the employer regarding the time of Ms. Long's call is unreliable. The administrative law judge concludes that the employer has failed to meet its burden of proving that the final absence was unexcused. Accordingly, the evidence fails to establish a current act of misconduct that might serve as a basis for disqualifying Ms. Long unemployment insurance benefits. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Long was discharged for no disqualifying reason. Accordingly, Ms. Long is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Long.

DECISION:

The Agency representative's decision dated March 13, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/tjc