

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SHELLEY J RIVERS**  
Claimant

**TMONE LLC**  
Employer

**APPEAL 17A-UI-08800-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/30/17**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the August 21, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for insubordination. The parties were properly notified of the hearing. A telephone hearing was held on September 18, 2017. The claimant, Shelley J. Rivers, participated. The employer, TMOne, L.L.C., participated through Ciera Turner, Senior Payroll Administrator. Employer's Exhibits 1 through 5 were received and admitted into the record without objection.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as an agent, from June 26, 2017, until August 3, 2017, when she was discharged within her probationary period. Claimant's initial work schedule was from 12:00 p.m. until 9:00 p.m., with Tuesdays and Sundays off. On August 2, claimant reported to work and discovered that her badge no longer granted her access to her workspace. After she was let into the work area, she was informed that she had been moved to a different work assignment. The employer instructed her to listen in on other agents' calls for the remainder of her work day. At 8:00 p.m., the last agent left for the day and claimant had no calls to monitor. She was told to go home at that time and come back at 11:00 a.m. the next day, so her entire workday would overlap with the other agents.

When claimant returned on August 3, she arrived and asked Brian Keenan, the trainer, what she should do. He instructed her to monitor calls again and had her sit with an agent she sat with the day before. Claimant asked if she could sit elsewhere, and he said no. Later that day, Keenan came up to claimant and told her that she could not be monitoring calls, so she would need to start taking calls or go home. At one point, she asked him the schedule for the training that was scheduled to occur the following week. She ultimately agreed to take telephone calls. After she began taking calls, Keenan came up to her and took her to Dylan's office, where she was discharged. Claimant had never been warned that her job was in jeopardy.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's

ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's testimony more credible than the employer's testimony.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. Here, the employer has not presented convincing evidence that claimant was insubordinate. Even if claimant did appear unhappy about her job assignment or schedule, there is no evidence that she was inappropriate or disruptive, and the employer admits that claimant did not outright refuse to comply with a work directive. The employer has not established that claimant was discharged for disqualifying, job-related misconduct. Benefits are allowed, provided she is otherwise eligible.

**DECISION:**

The August 21, 2017 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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