

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

KARA DAVIS
Claimant

BEATON INC
Employer

APPEAL NO. 22A-UI-18056-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/18/22
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) and (d) – Discharge for Misconduct

STATEMENT OF THE CASE:

On October 17, 2022, the employer filed a timely appeal from the October 7, 2022 (reference 02) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion the claimant was discharged on September 18, 2022 for no disqualifying reason. After due notice was issued, the appeal hearing began on November 7, 2022 and concluded on December 5, 2022. On November 7, 2022, the claimant participated and Kathy Frerichs, Controller, represented the employer.

On November 7, 2022, the administrative law judge adjourned the hearing after the claimant asserted she had not received the exhibits the employer had mailed to her. Those employer exhibits included three documents and surveillance records on a compact disc (CD). During the November 7, 2022 proceeding, that administrative law judge emailed the claimant a copy of the employer documentary exhibits (Exhibits 1, 2 and 3) and the claimant confirmed receipt of the emailed exhibits. Because the administrative law judge was unable to forward Exhibit 4 (digital surveillance record), the hearing was rescheduled to December 5, 2022. The employer agreed to place the video surveillance records on a flash/thumb drive and to mail them a second time to the claimant.

On December 5, 2022, the claimant participated and Kathy Frerichs, Controller, represented the employer. When the hearing reconvened on December 5, 2022, the claimant reconfirmed receipt of the employer's documentary exhibits (Exhibits 1, 2 and 3). The claimant denied that she had received a flash/thumb drive from the employer, but confirmed she had received and reviewed the surveillance records on the CD the employer had earlier mailed to her for the November 7, 2022 proceeding. Exhibits 1 through 4 and Exhibit A were received into evidence. Exhibit 1 is the appeal letter. Exhibit 2 consists of two pages of handbook material. Exhibit 3 is the handbook acknowledgment. Exhibit 4 is the digital surveillance record. Exhibit A is a brief text message the claimant submitted on December 1, 2022 without providing it to the employer. During the proceeding on December 5, 2022, the administrative law judge forwarded Exhibit A to the employer for use in the hearing.

On November 7, 2022 and on December 5, 2022, the administrative law judge took official notice of the Iowa Workforce Development records of benefits disbursed to the claimant

(DBRO), which record reflects not benefits have been paid to the claimant in connection with the original claim effective September 18, 2022.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Kara Davis (claimant) was employed by Beaton, Inc., doing business as Burger King, as a Crew Member. The claimant began her employment in January 2020 and last performed work for the employer on September 21, 2022.

At the time the claimant began her employment, the claimant acknowledged receipt of an employee handbook. The employer made the handbook available in a common area. The claimant did not read the handbook. The handbook included a Standards of Conduct section. In that section, the employer listed conduct that was unacceptable and that would result in disciplinary action up to and including termination of the employment. The list included the following:

- 10. Failing to offer a high degree of service and courtesy to any guest, Manager or employee of Beaton, Inc.
- 11. Theft, misappropriation or abuse of Beaton, Inc. property, funds, foods, supplies or the property of guests or another employee.
- ...
- 15. Procedural violations involving safety, security or cash handling policies.

On September 22, 2022, Robyn Ferris, Restaurant Manager at the employer's Manchester location sent the claimant a message advising that claimant was not to report for additional shifts and should contact Kathy Frerichs at the employer's office if she had questions. Ms. Frerichs is the company Controller. The purpose of the text message was to notify the claimant she was discharged from the employment. The claimant understood the message communicated a discharge. The claimant did not contact Ms. Frerichs.

The employer's management team including Ms. Frerichs, Ms. Ferris, District Manager Jesse Shear and Shift Supervisor Zachary Wefel participated in the discharge decision. Each of the managers is still with Beaton, Inc.

The employer discharged the claimant in response to an incident on September 21, 2022, wherein the claimant misappropriated a guest's lost wallet and stole money from the wallet. The steps of the claimant's subterfuge and theft were documented on the employer's video surveillance system and appear in Exhibit 4. The claimant received the lost wallet from a guest at the front counter. The claimant initially placed the wallet under the counter as she began to assist another customer at the counter. The claimant interrupted service to the customer and carried the wallet back to an office area. The claimant placed the wallet on top of her open purse in the office area. The claimant then returned to the front counter. Ten minutes after taking placing the wallet on top of her purse the claimant returned to her purse and closed the wallet in her purse. The claimant then returned to the front counter area. Seven minutes after closing the customer's wallet in her purse, the claimant returned to her closed purse. The claimant opened her purse and then opened the wallet to review its contents. The claimant

removed something from the wallet that a reasonable person would conclude was the customer's cash. The claimant then concealed the customer's cash in another area of her purse. The claimant removed an ID from the customer's wallet, reviewed the ID, and then returned the ID to the wallet. The claimant then resealed her purse with the customer's wallet inside her purse. Five minutes later, the claimant returned, collected her purse, and headed to the restroom at the front of the restaurant. The claimant entered the restroom and then exited the restroom within a minute. The claimant returned to the front counter area with her purse on one shoulder and the customer's wallet in her opposite hand. The claimant walked to the back of the restaurant and gave the wallet to a coworker, rather than to Shift Manager Zach Wefel, who was also present at the back of the restaurant area. The claimant's shift had ended. The claimant returned to the front counter area and then exited the restaurant shortly thereafter. The customer subsequently notified the employer that more than \$100.00 was missing from the wallet.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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). The Legislature recently codified the misconduct definition along with a list of types of disqualifying

misconduct. See Iowa Code section 96.5(2)(d). The list of disqualifying misconduct includes knowing violation of a reasonable and uniformly enforced work rule and theft of an employer or coworker's funds or property. See Iowa Code section 96.5(2)(d)(2) and (13).

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 Iowa Admin. Code r.871 -24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

Iowa Code section 714.1(1) and (2) define the criminal offense, in relevant part, as follows:

- 714.1 Theft defined. A person commits theft when the person does any of the following:
1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
 2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

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 Ct. 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.*

The weight of the evidence, indeed the overwhelming weight of the evidence, establishes the claimant misappropriated and stole from the customers lost wallet on September 21, 2022. At the appeal hearing, the claimant offered a clearly fabricated but poorly fabricated, highly implausible story concerning her actions, intentions, and purported communications in

connection with the theft incident. The claimant's bogus story is inconsistent with the video surveillance records, defies logic, and defies common sense. The includes in her fabricated story an assertion that she communicated with the wallet owner by text message during the brief period in question. The assertion is not supported by the video surveillance record. Nor has the claimant offered the purported text message record. A reasonable person would conclude there was no such communication. The claimant's conduct was in knowing violation of the employer's work rules. The claimant's conduct demonstrated a willful and wanton disregard for the employer's interests and in the victimized customer's interests. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Because the claimant has not received benefits in connection with the claim, there is no benefit overpayment to address.

DECISION:

The October 7, 2022 (reference 02) decision is REVERSED. The claimant was discharged on September 22, 2022 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.



James E. Timberland
Administrative Law Judge

December 7, 2022
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.