

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**CASEY A CARPENTER**  
Claimant

**APPEAL NO. 18A-UI-06948-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BANDANA'S MISSOURI LLC**  
Employer

**OC: 05/27/18**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 18, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant had been discharged on May 25, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on July 27, 2018. Claimant Casey Carpenter participated. Jason Zeck represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 2, 3, 18, 20, 24, 25, 29, 32, 35 and 36 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Casey Carpenter was employed by Bandana's Missouri, L.L.C., d/b/a Bandana's Bar-B-Q, as a full-time server and cashier until April 2017 until May 25, 2018, when Scott Coward, District Manager, discharged him from the employment. Jason Zeck, General Manager, and Ron Holz, Assistant Manager, were Mr. Carpenter's immediate supervisors and notified him of Mr. Coward's decision to end the employment.

Mr. Carpenter began his employment in April 2017 as a server. On March 30, 2017, Mr. Carpenter sat for two interviews. Mr. Zeck conducted the first interview. During the interview Mr. Zeck asked Mr. Carpenter the following question from an interview form: "Have you ever been convicted of a felony? If yes, please explain." Mr. Carpenter provided a one-word response to the question, "No." Mr. Zeck documented Mr. Carpenter's one-word response on the interview form. Mr. Carpenter's response to the question was untruthful. Mr. Carpenter knew at the time he provided the response that the response was untruthful. Mr. Carpenter had in fact been convicted of a felony drug offense in 2007 and had in fact been convicted of a second felony drug offense in 2010. At the time Mr. Carpenter began the employment, the employer provided him with an employee handbook. The handbook included a list of "Terminable Offenses" that included dishonesty.

Mr. Carpenter's felony convictions and several misdemeanor offense convictions, including convictions for failure to register as a sex offender and assault, came to the employer's attention on May 22, 2018, when the employer ran a background check on Mr. Carpenter in connection with the employer's consideration of Mr. Carpenter for promotion to hourly supervisor. As an hourly supervisor, Mr. Carpenter would supervise other staff, attend to the restaurant's money handling needs, and attend to all other aspects of the restaurant operations as needed. On May 12, Mr. Coward offered the promotion to Mr. Carpenter, but made the offer contingent on the background check. On May 15 or 16, Mr. Carpenter told Mr. Zeck that he had a felony conviction that was seven or eight years old. Mr. Carpenter did not state the nature of the criminal offense. Mr. Zeck told Mr. Carpenter that so long as there was not a "major" offense, it would not be a big issue. The employer received the criminal history report on May 22, 2018 and discharged Mr. Carpenter three days later.

Mr. Carpenter established an original claim for benefits for that was effective May 27, 2018 and received \$1,779.00 in benefits for the seven weeks between May 27, 2018 and July 14, 2018. Bandana's Missouri is a base period employer for purposes of the claim year that began for Mr. Carpenter on May 27, 2018.

On June 12, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview to address Mr. Carpenter's separation from the employment. The employer had submitted a notice of claim/protest form, but failed to designate a fact-finding representative on the form. The form was certified and signed by Phil Barron and provided a telephone number for Mr. Barron. At the time of the fact-finding interview, the deputy attempted to reach Mr. Barron at the number referenced on the notice of claim/protest form, but had to leave a message at a supervisor's voice mailbox. The notice of claim/protest form included the following statement: "We wish to protest this claim because the claimant was DISCHARGED on 5/28/18 for Dishonesty in violation of a known and reasonable company rule. The claimant indicated on his interview that he had never been convicted of a felony, but he actually had 17 offenses on the results of his background check. He was discharged for cause. Please see attached documentation." The documents the employer submitted for the fact-finding interview included the employer's policy prohibiting dishonesty, proof that the Mr. Carpenter had received a handbook containing the policy, a copy of the May 22, 2018 background check, the March 30, 2018 interview forms, and a discharge document setting forth the basis for the discharge as follows: "During interview process was asked the question Have you Been convicted of a felony he answered No." At the time of the fact-finding interview, Mr. Carpenter provided a statement to the deputy. Mr. Carpenter's statement to the deputy included material misrepresentations intended to mislead the deputy. These included an assertion that Mr. Carpenter had a background check at the time of hire, that the information indicating he had 17 offenses on his criminal history was false, and that Mr. Coward had told him that since the offenses were old, he should be ok.

## 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 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 Administrative Code rule 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 Iowa Administrative Code rule 871-24.32(4).

Iowa Admin. Code r. 871-24.32(6) provides:

Discharge for misconduct.

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The weight of the evidence establishes a discharge based on misconduct in connection with the employment. The weight of the evidence in the record establishes that Mr. Carpenter knowingly and intentionally provided false information to the employer at his March 30, 2017 interview in order to conceal two prior felony convictions and deflect further inquiry that would bring to the employer's attention not only the felony drug convictions, but also the prior convictions for assault and for failure to register as a sex offender. By intentionally withholding such information from the employer, information that indicated a well-established pattern of criminal behavior, Mr. Carpenter placed the employer, its staff, and its customers at risk and exposed the employer to liability. Mr. Carpenter continued to withhold the information from the employer until it was clear to him that the employer had commenced a criminal history inquiry. Even then, Mr. Carpenter attempted to soothe the employer into thinking there was nothing significant in the criminal history when Mr. Carpenter clearly knew otherwise. Mr. Carpenter's actions demonstrated an intentional and substantial disregard of the employer's interests. Because the evidence establishes misconduct in connection with the employment, Mr. Carpenter is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Carpenter received benefits, but this decision disqualifies him for those benefits. Accordingly, Mr. Carpenter is overpaid \$1,779.00 in benefits for the seven weeks between May 27, 2018 and July 14, 2018.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.  
24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live

testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The documentation the employer provided for the fact-finding interview was sufficient to satisfy the participation requirement. Even if the evidence had indicated otherwise, the weight of the evidence establishes that Mr. Carpenter's statement to the deputy on June 12, 2018 included statements designed to mislead the deputy. Because the employer participated in the fact-finding interview within the meaning of the law, Mr. Carpenter is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Carpenter.

**DECISION:**

The June 18, 2018, reference 01, decision is reversed. The claimant was discharged on May 25, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,779.00 in benefits for the seven weeks between May 27, 2018 and July 14, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs