

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHONDA R CARTER
Claimant

HY-VEE INC
Employer

APPEAL NO. 23A-UI-10524-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/01/23
Claimant: Appellant (5)**

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

STATEMENT OF THE CASE:

On November 9, 2023, Shonda Carter (claimant) filed a timely appeal from the October 30, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant voluntarily quit on October 3, 2023 without good cause attributable to the employer. The claimant requested an in-person hearing. After due notice was issued, an in-person hearing was held on December 14, 2023 at the Davenport IowaWORKS Center. Claimant participated in-person. Melissa Hill of Corporate Cost Control appeared by telephone and represented the employer. The employer presented in-person testimony through Kay Meyers and Elise Garcia. Exhibit A was received into evidence.

The claimant appeared for the in-person hearing on crutches and with an ace bandage wrapped around her right foot. At the start of the hearing, the claimant asserted she was physically and mentally able to participate in the hearing. The claimant demonstrated throughout the hearing that she was physically and mentally able to fully participate in the hearing. At the end of the hearing, the claimant asserted she had not been thinking clearly enough to fully participate in the hearing. At that time, the administrative law judge noted on the record that the claimant had demonstrated throughout the hearing that she was physically and mentally able to fully participate in the hearing. At the close of the hearing, the claimant advised that she had driven herself to the hearing site and would be driving herself from the hearing site.

ISSUES:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntarily quit without good cause attributable to the employer.

FINDINGS OF FACT:

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

Shonda Carter (claimant) was employed by Hy-Vee, Inc. as a full-time Bakery Wrapper from September 2022 until October 3, 2023, when the employer discharged her from the employment. The claimant performed her work duties at a regional bakery facility in Davenport.

The claimant's scheduled shift started at 9:00 a.m. and ended at 5:00 p.m. The claimant had multiple supervisors and leads. The claimant's wage was \$19.00 an hour.

Under the employer's break policy, the claimant would receive a 30-minute lunch break. If the claimant remained in the facility during the lunch break, the employer would compensate the claimant for the lunch break. If the claimant left the facility during the lunch break, the lunch break would be uncompensated. The claimant could decide when to go to lunch break, but was required to notify a supervisor or lead person before she departed from the production floor. Under the employer's break policy, the claimant was not scheduled for additional breaks. The claimant was allowed to leave the production floor for a brief period for the purpose of using the restroom or for another reasonable purpose, so long as she notified a supervisor or lead person before she departed the production floor. The claimant was at all times aware of the employer's break policies.

The employer discharged the claimant in response to a pattern of unauthorized absences from the production floor. Toward the end of the employment, one or more of the claimant's coworkers complained to the employer that the claimant was frequently disappearing from the production floor for extended periods. In response to the coworker complaints the employer began to closely monitor the claimant's departures from the production floor. The workplace was equipped with surveillance cameras that allowed the employer to track the claimant's actions in real time and to review surveillance records.

On September 26, 2023, the claimant took her 30-minute lunch break and then extended her break by an additional 39 minutes. During that time, the claimant spent an extended period in what the employer refers to as the mothers' room, a single-person lactation room. The claimant spent an extended period on a non-emergency phone call with her adult son, who was at that point in conference with his attorney in connection with an initial appearance on a criminal charge. According to the surveillance record, the claimant left the production floor at 12:46 p.m. and did not return until 1:55 p.m. The claimant stopped at the human resources manager's office. The claimant told the human resources manager that she had needed to take an emergency phone in connection with someone at the other end of the call losing consciousness and asserted she had been unable to let a supervisor or lead know before took the call. The claimant intentionally provided a false information to the employer regarding the nature of the call.

On September 27, 2023, the claimant took a 10 minute break from 9:52 a.m. to 10:02 a.m., during which time the claimant went to the restroom and then stopped at the break room before returning to her workstation. At 11:20 a.m., the claimant took an eight-minute break during which she went to the restroom and again stopped at the break room before returning to the production floor. At 3:52 p.m., the claimant took a six-minute break during which she went to the break room. The claimant clocked out at 3:58 p.m. and left for the day.

On September 28, the claimant left the production floor at 10:52 a.m., visited the restroom, and returned to the production floor at 11:05 a.m. The claimant was away from the production floor for 13 minutes. The claimant took her normal lunch break. The claimant left the production floor again at 2:39 p.m., ostensibly for the purpose of using the restroom. However, the claimant loitered in the vicinity of the restrooms for nine minutes before entering one of the single-person women's restrooms. The single-person unisex restroom was open throughout that nine-minute period, but the claimant did not wish to use that restroom. During that nine-minute period, someone exited one of the women's restrooms, but the claimant did not notice. After the claimant visited the restroom, she went to the dishwashing room and loitered for several minutes before returning to the production floor. The claimant had not work-related need to visit

the dishwashing room. The claimant ended up being away from the production floor for 24 minutes. Also on September 28, the claimant left the production floor at 3:38 p.m. The claimant went first to the locker room and then entered the mothers' room 3:43 p.m. The claimant then visited the break room, returned to the mothers' room, and then visited the restroom at 3:51 p.m. The claimant was away from the production floor for 13 minutes.

On September 29, 2023, the claimant left the production floor at 10:28 a.m. The claimant visited the restroom and exited the restroom at 10:41 a.m. The claimant then walked around for three minutes before returning to the production floor at 10:44 a.m. While the claimant asserts she may have gone to get materials for her work area, the surveillance record documented otherwise. At 12:10 p.m., the claimant again exited the production floor. The claimant first visited the locker room. The claimant then visited the break room before returning to the production floor at 12:23 p.m. The claimant took her lunch break at 1:24 p.m. The claimant extended her lunch break by three minutes and then returned to the production floor. The claimant later left the production floor at 2:43 p.m. The claimant went to the mothers' room and loitered there more than an hour until 3:50 p.m., until Lead Elise Garcia opened the door to the mother's room and observed the claimant staring at a wall. Ms. Garcia was supervising the claimant's production area and had noted the claimant's extended absence from the production floor. Ms. Garcia had gone to look the claimant. When Ms. Garcia located the claimant in the mothers' room, she asked the claimant whether she would be clocking out or returning to the production floor. The claimant stated she was going to ask the plant manager if she could go home. Ms. Garcia motioned for the claimant to exit the mothers' room. Ms. Garcia remained in the area to see whether the claimant would go to the plant manager's office. The claimant continued to loiter in the area for 10 minutes, during which time the plant manager entered the area. The claimant did not at that time attempt to get the plant manager's attention. After a period of 10 minutes, the claimant went to the plant manager's office and requested to leave for the day.

The claimant asserts that she was having her period during this week when the employer was reviewing her absences from the production floor. However, that would not explain the extended absences from the production floor that were not directly related to visits to the restroom.

The claimant was paid all of the time during which she was clocked in, including the times when the claimant was loitering away from the production floor.

On October 3, 2023, the plant manager and the human resources manager met with the claimant to discuss the frequent absences from the production floor. The claimant asserted that she had always spoken to someone prior to exiting the production floor. The employer knew this was not true. The employer concluded the claimant's explanations for her frequent absences from the production floor were unsatisfactory and elected to discharge the claimant from the employment for violation of and abuse of the break protocol. The employer had not previously issued a warning or reprimand to the claimant for the behavior. The employer did not examine video surveillance for the period prior to September 26, 2023.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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). 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).

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 evidence in the record establishes a discharge for misconduct in connection with the employment based on the claimant’s repeated and knowing violation of the employer’s break policy. The weight of the evidence establishes that the claimant on several occasions while she was on the clock during the period of September 26 through September 29 departed the production floor and then loitered away from the production floor to avoid work. Some of these loitering periods were brief periods and others were extended periods. The claimant knowingly and intentionally misled the employer regarding the basis for the extended phone call on September 26, 2023. The claimant’s intentional dishonesty is an aggravating factor. The claimant was paid for her periods of loitering. Just as the claimant intentionally provided false information to the employer regarding the basis for the extended break and phone call on September 26, the claimant also initially misled the administrative law judge regarding the basis for the call. The claimant asserted she could not discuss the call due to HIPAA law. Through further questioning, it became clear the call had nothing to do with HIPAA, a medical issue or an emergency. This attempt to mislead the administrative law judge significantly undermined the claimant’s testimony. Other assertions made by the claimant were credibly refuted by the employer’s testimony from review of the surveillance record. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant’s weekly benefit amount. The claimant must meet all other eligibility requirements. The employer’s account shall not be charged for benefits.

DECISION:

The October 30, 2023 (reference 01) decision is MODIFIED without change to the eligibility or liability determination. The claimant was discharged on October 3, 2023 for misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in dark ink on a light-colored, slightly textured background.

James E. Timberland
Administrative Law Judge

December 22, 2023
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
6200 Park Ave Suite 100
Des Moines, Iowa 50321
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
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: 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.