

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

JARED WERTENBERGER
Claimant

APPEAL NO. 23A-UI-00622-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURLINGTON STAGE LINES LTD
Employer

**OC: 12/18/22
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

On January 20, 2023, the employer filed a timely appeal from the January 17, 2023 (reference 01) 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 December 22, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on February 7, 2023. Jared Wertenberger (claimant) participated. Caylie Cherry represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview. Exhibit 1, the cursory online appeal, was not received into evidence.

ISSUES:

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

Jared Wertenberger (claimant) was employed by Burlington Stage Lines, Ltd. as a full-time Safety and Compliance Coordinator from January 2021 until December 22, 2022, when Caylie Cherry, Human Resources Director, and Mark Moore, General Manager, discharged him from the employment. Mr. Moore was the claimant's immediate supervisor. The employer provides intercity and rural bus transportation services.

As a Safety and Compliance Coordinator, the claimant was responsible for overseeing all aspects of safety and compliance, including training employees, conducting investigations, and

maintaining safety and compliance records. The nature of the claimant's position and duties required that the claimant remain honest and trustworthy in all his dealings.

On December 22, 2022, the employer interviewed the claimant as part of its investigation of concerns another Safety and Compliance Coordinator brought to the employer's attention on December 20, 2022. The coworker's concerns included an allegation that the claimant had smoked in a company vehicle on December 18, 2022. The claimant had indeed smoked in a company car on December 18, 2022 while the coworker was in the vehicle and despite the no smoking sign posted on the dash of the vehicle. At the time the claimant smoked in the vehicle, he was aware that the employer prohibited smoking in company vehicles and was aware of the 2008 Iowa Smokefree Air Act, Iowa Code chapter 142D, that prohibited smoking in employer owned vehicles.

Before the employer met with the claimant on December 22, 2022, the employer listened to an audio-recording the claimant's coworker made of her discussion with the claimant regarding the smoking incident and regarding whether the company vehicle needed to be sanitized after the claimant smoked in the vehicle. The claimant's recording utterance included his acknowledgment that he had smoked in the vehicle and his determination the vehicle did not need to be sanitized.

When the employer interviewed the claimant on December 22, 2022, the employer repeatedly asked the claimant whether he had smoked in the company vehicle and the claimant repeatedly denied that he had smoked in the vehicle. The employer then had the claimant's coworker join the discussion. After the coworker joined the discussion, and after the coworker told the claimant to tell the truth or she would play the audio-recording, the claimant admitted that he had smoked in the company vehicle. When the employer asked the claimant why he had been dishonest earlier in the investigative interview, the claimant cited his fear of consequences.

At the time of hire, the employer provided the claimant an employee handbook. The handbook included a business ethics and conduct policy. The business and ethics policy obligated employees to refrain from illegal, dishonest or unethical conduct.

The employer discharged the claimant from the employment following the December 22, 2022 investigative interview.

The employer cites a January 2022 instance in which the claimant was less than forthright with the employer when the employer was reviewing the quantity of work performed by the claimant. In that instance, the employer concluded the claimant's answers to the employer's question were vague. The employer determined the quantity of work performed by the claimant was being negatively impacted by the claimant spending an hour or more per day on non-work related Internet activity. On February 11, 2022, the employer issued a written warning.

The claimant established an original claim for benefits that was effective December 18, 2022 and received \$2,860.00 in benefits for five weeks between December 25, 2022 and January 28, 2023. This employer is a base period employer.

On January 6, 2023, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employment. Caylie Cherry, Human Resources Director, represented the employer at the fact-finding interview. In addition, the employer submitted written protest materials in which the employer set forth the particulars of the incident of dishonesty that triggered the discharge. The protest materials included a copy

of the employer's Business Ethics and conduct policy, as well as the February 11, 2022 written warning.

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:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (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. "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 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).

The claimant was discharged for misconduct in connection with the employment. The claimant knowingly and intentionally violated the employer's non-smoking protocol and Iowa Code section 142D.3(1)(b) of the Iowa Smokefree Air Act (prohibiting smoking in a vehicle owned, leased or provided by the employer) by smoking in the employer's vehicle on December 18, 2022. The claimant's conduct exposed his coworker to second-hand smoke and potentially exposed himself and the employer to civil penalty under Iowa Code section 142D.9(1) and (2) (providing civil penalties for smoking in prohibited areas and for employer failure to enforce). Despite being fully aware that honesty and trustworthiness in all dealings were essential to his role as a Safety and Compliance Coordinator, the claimant elected to repeatedly provide dishonest responses to the employer's questions during the December 22, 2022 investigative interview. Only after the employer had the coworker join the interview, and only after the worker admonished the claim to tell the truth and threatened to play the audio-recording, did the claimant provide a truthful response to the employer's question regarding whether the claimant smoked in the employer's vehicle. The claimant's intentional dishonesty fundamentally undermined the employer's ability to trust the claimant and demonstrated a willful and wanton disregard of the employer's interests. The claimant's knowing and intentional disregard of the employer's non-smoking protocol and the Smokefree Air Act also demonstrated a willful and wanton disregard of the employer's interests. The claimant's attempt to justify and excuse the smoking violation with the assertion that he had received disturbing information immediately before he lit up rings hollow. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for 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 base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$2,860.00 in benefits for five weeks between December 25, 2022 and January 28, 2023, but this decision disqualifies the claimant for those benefits. Accordingly, the benefits the claimant received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The January 17, 2023 (reference 01) decision is REVERSED. The claimant was discharged on December 22, 2022 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,860.00 in benefits for five weeks between December 25, 2022 and January 28, 2023. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant.



James E. Timberland
Administrative Law Judge

February 16, 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
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.