

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

VICTORIA WHITTEN
Claimant

APPEAL NO. 18A-UI-08038-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TMONE LLC
Employer

OC: 05/27/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Victoria Whitten filed a timely appeal from the July 20, 2018, reference 04, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Whitten was discharged on May 31, 2018 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on August 16, 2018. Ms. Whitten participated. Ciara Turner represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-08039-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Victoria Whitten was employed by TMone, L.L.C., as a full-time agent/telemarketer from February 2018 until May 31, 2018, when Eric Burchmeyer, Director of Operations, discharged her from the employment for violating the employer's zero-tolerance policy that prohibited employees from hanging up on customers. Melissa Fowler, Operations Supervisor, was Ms. Whitten's immediate supervisor.

The conduct that triggered the discharge occurred on May 31, 2018. Between 11:30 a.m. and 2:30 p.m., Ms. Fowler listened to Ms. Whitten's phone calls. During that period, Ms. Whitten disconnected from calls with about 10 customers immediately after the customer answered the phone. Ms. Whitten was aware of the employer's policy that prohibited employees from hanging up on customers. For all but two or three of the calls, Ms. Whitten had hung up because she could not hear the customer due to the noise her coworkers were making in her vicinity. However, for the remaining two or three calls, Ms. Whitten hung up on the customer immediately after the customer answered because she was frustrated with the chaotic work environment. On May 17, 2018, Ms. Fowler had met with Ms. Whitten to discuss similar hang

up issues regarding calls handled by Ms. Whitten. At that time, Ms. Whitten was having issues with her headset. Ms. Whitten and Ms. Fowler discussed and resolved the headset issues.

Toward the end of the employment, Ms. Whitten was not producing sales. This impacted Ms. Fowler's ability to earn a supervisor bonus and may have factored in the discharge decision.

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 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 871 IAC 24.32(4).

The evidence in the record establishes that Ms. Whitten violated the employer's hang up policy on May 31, 2018. However, the evidence establishes that the violations occurred in the context of and due to a noisy, chaotic work environment that negatively impacted Ms. Whitten's ability to focus on and perform her work. The employer presented insufficient evidence to rebut Ms. Whitten's testimony regarding the extenuating circumstances surrounding the May 31 violations. The employer had the ability to present testimony from Ms. Fowler, but elected instead to present testimony from a witness lacking in personal knowledge of the matters in question.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Whitten was discharged for no disqualifying reason. Accordingly, Ms. Whitten is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 20, 2018, reference 04, decision is reversed. The claimant was discharged on May 31, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs