

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DEVIN D BEKISH**  
Claimant

**THE CHEESECAKE FACTORY REST INC**  
Employer

**APPEAL 22A-UI-05104-AR-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/14/21  
Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871—24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the February 11, 2022, (reference 05) unemployment insurance decision that allowed benefits based upon the determination that claimant was discharged, but not for disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on April 6, 2022. The claimant, Devin D. Bekish, did not participate. The employer, The Cheesecake Factory Restaurant, Inc., participated through witnesses Leslie Anderson and Renee Blanco. Kaylynn Bousman observed but did not testify. Employer's Exhibits 1 through 10 were admitted. The administrative law judge took official notice of the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a server from July 19, 2021, until this employment ended on January 13, 2022, when he was discharged.

On January 8, 2022, claimant dropped a "green ticket," for a staff meal, off with a coworker, Angel Love. Love was assisting a customer at the time. Additionally, when Love looked at the ticket, she realized it requested an item not available for green tickets. Love asked Bousman to take the ticket to a manager. Bousman took the ticket to claimant, instead. He became angry and approached Love where he began calling her derogatory names and being intimidating in front of a customer and their coworkers. Claimant repeatedly left and then returned to continue berating Love. He called Love a "bitch" and told her that she has "resting bitch face." The customer remarked to a manager that they were uncomfortable with the situation.

When management became aware of the situation, they shut down claimant's section and brought him in to a meeting to discuss what happened. He wrote a statement about the incident. Thereafter, the employer conducted an investigation that consisted of taking the statements of witnesses to the incident. At the conclusion of the investigation, the employer determined that claimant had violated two provisions of its "Forbidden List," and Anderson called claimant to inform him of his discharge. Claimant had not received warnings for similar conduct in the past. The employer notes that the "Forbidden List" is issued to each employee at hire and states that violations of its provisions can result in termination.

The administrative record indicates that claimant has received no unemployment insurance benefit payment since this separation from employment. Though the employer received notice of a fact-finding interview from Iowa Workforce Development, the administrative record does not reflect that it participated in that fact-finding interview. Blanco testified that she did not receive a call for the interview at the appointed time.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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 established that claimant used offensive and derogatory language toward a coworker in front of other employees and a customer. The employer has further established that claimant's conduct was intimidating to his coworker, upsetting to other coworkers, and that it offended a customer. This evidence is un rebutted. Though claimant had not received a prior warning about similar conduct, the allegations regarding the conduct that led to termination are sufficiently egregious to constitute disqualifying misconduct, even without prior warning. Benefits are denied.

Claimant's separation was disqualifying; however, he has not received any unemployment insurance benefits. The issue of overpayment is moot. As the employer's account has not been subject to charges based on this separation, the issue of participation in the fact-finding interview is moot.

**DECISION:**

The February 11, 2022, (reference 05) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Claimant has not received any unemployment insurance benefits. The issues of overpayment and the employer's participation in the fact-finding interview are moot.



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Alexis D. Rowe  
Administrative Law Judge

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April 12, 2022  
Decision Dated and Mailed

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