

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

KIMBERLY WATKINS
Claimant

KWIK TRIP INC
Employer

APPEAL NO. 22A-UI-17095-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/14/22
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

On September 7, 2022, the employer filed a timely appeal from the August 31, 2022 (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 August 15, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on October 11, 2022. Kimberly Watkins (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Susan Weida, Assistant Store Leader, represented the employer. Exhibits 1 and 4 through 9 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which record reflects the claimant made no weekly claims and received no benefits in connection with the claim.

ISSUE:

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

FINDINGS OF FACT:

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

Kimberly Watkins (claimant) was employed by Kwik Trip, Inc. as a full-time Assistant Food Service Leader (assistant kitchen manager) from June 2021 until August 15, 2022, when the employer discharged her from the employment for violating the employer's established food safety and food quality protocols. The sole incident that factored in the discharge occurred on August 10, 2022. On that day, the claimant was performing her usual duties of supervising the fried chicken preparation area of the employer's kitchen when a subordinate dropped a piece of chicken on the floor. The subordinate asked the claimant whether she should "waste" the piece of chicken, meaning discard the piece of chicken and document that she had discarded the chicken. "Wasting" the piece of chicken was the only course of action consistent with the employer's food safety and food quality protocols. Instead of telling the subordinate to "waste" the chicken, the claimant told the subordinate "no, just wash it." This directive violated the employer's food safety and food quality protocol. It also created the risk of foodborne illness.

The subordinate reported the claimant's directive to Store Leader (store manager) Dylan Semann, who conducted an investigation. As part of the investigation, the employer reviewed the kitchen surveillance record, which included video and audio that captured the subordinate picking up the piece of chicken from the floor and the claimant's interaction with the subordinate. The employer's witness for the appeal hearing, Assistant Store Leader Susan Weida, reviewed the video surveillance on August 15, 2022 and concurred with the conclusion the claimant had violated the employer's food safety and food quality protocol. The claimant had received appropriate training in the employer's food safety and food quality protocol and, as Assistant Food Service Leader, was charged with modeling and enforcing the food safety and food quality protocol. When the employer questioned the claimant regarding why she had given the directive to the subordinate, the claimant confirmed her awareness of the applicable food safety and food quality protocol. The claimant stated she did not know why she had issued the directive to the subordinate. The claimant admitted that her conduct violated the employer's food safety and food quality protocol. The employer concluded the claimant's conduct on August 10, 2022 called into question the claimant's conduct at other times. In other words, the employer concluded the employer could no longer trust that the claimant would adhere to food safety and food quality protocols.

The claimant established an original claim for benefits that was effective August 14, 2022, but made no weekly claims and received no unemployment insurance benefits in connection with the claim.

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 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 evidence in the record establishes a discharge for misconduct in connection with employment. The evidence establishes that on August 10, 2022, the claimant knowingly and intentionally violated the employer's food safety and food quality protocol, and directed a subordinate to do the same. The claimant's conduct indicated an intentional and substantial disregard of the employer's interests in food safety and food quality. The claimant's conduct fundamentally undermined the employer's ability to trust the claimant to comply with established food safety and food quality protocols. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

Because the claimant has received no benefits in connection with the claim, there is no overpayment of benefits to address.

DECISION:

The August 31, 2022 (reference 01) decision is REVERSED. The claimant was discharged on August 15, 2022 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive, flowing style.

James E. Timberland
Administrative Law Judge

October 14, 2022
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 adquiera 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.