

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

BRITTANI O BERRY
Claimant

TMONE LLC
Employer

APPEAL NO. 23A-UI-01860-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/22/23
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 February 22, 2023, the employer filed a timely appeal from the February 16, 2023 (reference 02) 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 January 18, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on March 10, 2023. Brittanni Berry (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. Joseph Norman represented the employer and presented additional testimony through Maria Garcia. Exhibits 1, 3 and 4 were received into evidence. Exhibit 2 was illegible and was not received into evidence. 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 determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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:

Brittanni Berry (claimant) was employed by TMone, L.L.C. as a full-time Agent from September 6, 2022 until January 18, 2023, when Operations Manager Maria Garcia and Supervisor Joseph Norman discharged her from the employment. Mr. Norman was the claimant's immediate supervisor. The claimant worked remotely from her home. The claimant was assigned to

provide computer/phone-based customer service and technical support for customers of a client telecommunications company.

At the start of the employment, the employer reviewed with the claimant company policies set forth in the employee handbook. The employer had the claimant sign to acknowledge the handbook policies. The reviewed policies included a telephone use policy. The policy prohibited personal calls outside of lunch and break times unless the employee first obtained a supervisor's permission. The policy stressed the telephone-based nature of the work and the corresponding need to keep personal phone use away from areas where calls with the client's customers were taking place. The phone use policy indicated that violation of the phone use policy could lead to discipline up to and including discharge from the employment. The policies the employer reviewed with the claimant at the time of hire also included the following: "Employee shall not act or speak in a way that will damage the professional image or reputation of Company or another employee or associated individual or customer." The policies the employer reviewed with the claimant included a requirement that employees "Address fellow employees, clients and customers, and visitors in a professional, courteous, and respectful manner." The policies included a non-exhaustive list of examples of "inappropriate behavior and misconduct." The list included "Use of obscene, abusive, or threatening language..." and "Any behavior or practice, whether or not mentioned in this Handbook, inconsistent with the ordinary and reasonable conduct necessary for a productive work atmosphere..."

The sole incident that factored in the employer's decision to discharge the claimant from the employment occurred during the claimant's shift on January 18, 2023. On that day, Mr. Norman, as part of his normal supervisory duties, reviewed a customer call the claimant handled that day. The customer had phone connectivity issues that impacted the call with the claimant. During a time when the claimant may have thought the customer's line had temporarily dropped the call, the claimant made a personal phone call. The claimant's computer monitor would have shown that the call with the customer was still live. As part of her personal call, the claimant used the n-word, a racial epithet widely condemned as highly offensive and derogatory. The claimant is African-American. While the claimant engaged in her personal call, the customer spoke up and said the customer was on the line. The customer did not indicate whether the customer had heard the racial epithet. However, the claimant's utterance became part of the recorded call with the customer. In addition to concerns about the multiple policy violations involved in the claimant taking the personal phone call and the claimant's utterance, the employer was concerned that such conduct could damage its relationship with the client business. The employer met with the claimant on January 18, 2023. The claimant acknowledged her conduct during the call was inappropriate. The employer discharged the claimant. The employer's customer service and tech support work for the particular client business continues.

The claimant established an original claim for benefits that was effective January 22, 2023. Iowa Workforce Development set the weekly benefit amount at \$99.00. The claimant received \$594.00 in benefits for the six weeks between January 22, 2023 and March 4, 2023. TMone, L.L.C. is a base period employer.

On February 15, 2023, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employment. The employer or its agent, People Systems, had notice of the fact-finding interview, but neither participated in the fact-finding interview. The claimant provided a verbal statement to the IWD deputy that included an intentionally and materially false statement that the employer discharged the claimant from the employment because the program the claimant was assisting with was too complicated and the employer was ending its work on the program.

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.

...

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 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984).

The evidence in the record establishes a discharge for misconduct in connection with the employment. On January 18, 2023, the claimant knowingly and intentionally violated the employer's policy prohibiting personal phone calls in the vicinity of customer calls and outside of designated break times. The claimant's conduct violated additional employer policies. The claimant may or may not have intended her use of the racial epithet to be derogatory or offensive. Regardless, the term is generally regarded as highly offensive and its use was wholly inappropriate in the context of the live customer phone call. The employer was reasonably concerned about the inclusion of the utterance in the recorded customer call. The employer was reasonably concerned with the possibility the client's customer heard the utterance. The employer was reasonably concerned with the potential negative impact of the call on its relationship with the client business. The claimant's conduct demonstrated a willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. The claimant's 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 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 \$594.00 in benefits for the six weeks between January 22, 2023 and March 4, 2023, but this decision disqualifies the claimant for those benefits. Accordingly, the benefits the claimant received constitute an overpayment of benefits. Though the employer did not participate in the fact-finding interview, the claimant willfully misrepresented the basis for or a factor in her discharge. For this reason, 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 February 16, 2023 (reference 02) decision is REVERSED. The claimant was discharged on January 18, 2023 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 claimant is overpaid 594.00 in benefits for the six weeks between January 22, 2023 and March 4, 2023. 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.



James E. Timberland
Administrative Law Judge

March 13, 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.