

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

COBY J CRIST
Claimant

APPEAL NO. 24A-UI-00800-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

A J S OF DES MOINES INC
Employer

OC: 12/03/23
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On January 19, 2024, Coby Crist (claimant) filed a timely appeal from the January 9, 2024 (reference 02) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on December 4, 2023 for violation of a known company rule. After due notice was issued, a hearing was held on February 8, 2024. Claimant participated. Scott Schwiesow represented the employer and presented additional testimony through Chris Johnson. Exhibits 1 through 18, A, B and C were received into evidence. Exhibits E and F were not relevant to the hearing issues and were not received into evidence.

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:

Coby Crist (claimant) was employed by A.J.S. of Des Moines, Inc., doing business as ServiceMaster by Rice, as a full-time Lead Technician until December 4, 2023, when the employer discharged him from the employment. The claimant worked as part of a two to four-member restoration and clean-up crew. The work involved residential and commercial jobsites. The work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. The workday would include a 10-minute morning and afternoon break, as well as a 30-minute unpaid lunch break. Chris Johnson, Regional Manager, was the claimant's supervisor throughout the employment.

Mr. Crist began the employment on April 30, 2021. At that time, the employer provided Mr. Crist an employee handbook. Mr. Crist signed to acknowledge receipt of the handbook and his responsibility to read and comply with the company policies in the handbook. Mr. Crist asserts he did not read the handbook or the relevant handbook policies until after he was discharged

from the employment. The handbook included policies pertaining to customer confidentiality. That policy included the following:

Any customer information or data obtained directly or indirectly, including whatever might be seen or heard at a customer site, is to be held in confidence. ...

Information about the customer site damage and our work is not to be shared outside of work or with the general public. Employees are not to take photographs or videos at customer sites. Photographs, video, or comments related to customer sites are not to be posted or shared on social media or with people outside of work.

...

Failure to maintain customer confidentiality will result in disciplinary action, up to and including termination of employment.

See Exhibit 11.

The handbook also included a social media policy. The policy does not prohibit all social media postings pertaining to the employment. The policy includes the following:

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with ServiceMaster by Rice, as well as any other form of electronic communication. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved.

Keep in mind that violation of this policy or any conduct that adversely affects your job performance, the performance of co-workers, or otherwise adversely affects employees, customers, vendors, business partners, and people who work on behalf of ServiceMaster by Rice or ServiceMaster by Rice legitimate business interests may result in disciplinary action, up to and including termination.

Be respectful

Be fair and courteous to fellow employees, customers, vendors, or people who work on behalf of ServiceMaster by Rice. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action, up to and including termination.

Keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers, Supervisor, or Management Team than by posting complaints on social media. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video, or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, employees, or vendors, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, color, religion, gender, sexual orientation, gender identity, national origin, age,

disability, genetic information, marital status, veteran status, or any other protected by law.

Be honest and accurate

...

See Exhibit 12.

The handbook also included a progressive discipline policy, but indicated the employer could at its discretion depart from the progressive discipline process. See Exhibit 13.

The employer's decision to discharge the claimant was based on the claimant's social media posts to the TikTok platform. The claimant asserts that the videos were filmed while he was on break.

On January 23, 2023, the claimant posted a video to TikTok that depicts a coworker being asked whether he had ever been in a relationship "that should have been a blowjob." The coworker is seated inside the employer's work truck and is wearing a ServiceMaster sweatshirt. See Exhibit 1.

On May 7, 2023, the claimant posted a video to TikTok that depicts the claimant singing along to a rap song. The claimant is wearing a ServiceMaster shirt. The song includes both the so-called n-word and f-word. The claimant is African American. The song is in essence about a black person succeeding. See Exhibit 2.

On May 10, 2023, the claimant posted a video to TikTok that depicts a shirtless, overweight coworker moving up and down in a way that accentuates the coworker's weight, while a somewhat bawdy song plays. The coworker willingly participated in the video. The video frame includes a portion of the employer's work truck, including the last four digits of the employer's phone number. See Exhibit 3.

On September 19, 2023, the claimant posted a video to TikTok that depicts the inside of a residential customer's home, including a wet floor, and commentary from the claimant about breaking "another pipe." The employer asserts the emojis that accompany the video appear to make light of the damage to the customer's home. See Exhibit 4.

On September 19, 2023, the claimant posted a video to TikTok that depicts a coworker drumming on a customer's table inside the customer's house. The video includes a statement from the claimant that that this is what he has to do to get through a "shitty job." See Exhibit 5.

On October 10, 2023, the claimant posted a photo or video to TikTok that depicts the claimant's image and that includes the written statement, "My CoWorker got suspended 3 days for making a sign at work, you know me then its [sic] only fitting." The claimant created the post while he was off-duty. The photo or video appears to have been taken in a claimant's personal vehicle. The claimant does not mention the employer's name or the coworker's name. The photo or video does not include work attire or the employer's logo. See Exhibit 14.

On October 16, 2023, the claimant posted a photo or video to TikTok that depicts the claimant sitting in his personal vehicle and the written statement, "What I learned from getting SUSPENDED from work Friday. Happy Monday Yall!!!!!" The claimant is wearing a sweatshirt with the ServiceMaster logo displayed. See Exhibit 15.

On October 21, 2023, the claimant posted a photo or video to TikTok depicting the claimant inside the employer's warehouse raising his middle finger in an offensive gesture. The photo or video includes the written message, "When Management treats you like a business instead of a Valuable Employee... Then tries to be your Friend...." The claimant is wearing a stocking cap with the employer's logo on it, but the logo is not visible. See Exhibit 16.

Also on October 21, 2023, as part of the same video or separate photo, the claimant posted a photo or video to TikTok that depicts him in the employer's warehouse. The photo or video includes the claimant's first name and the location as Cedar Rapids. The photo video includes the following written statement: "I put off the Same ENERGY I received from people...Ive [sic] worked here 2 and half years.. NEVER CALLED IN, have only missed days with my PTO and aint [sic] ever been late to work.. I do this job because I love helping people and I have a family to feed. When I see PERKS getting handed to people who don't deserve it... I tend to get a little SALTY!!!!!" See Exhibit 17.

During the first week of November 2023, Mr. Johnson became aware of two videos the claimant had posted to TikTok.

On November 13, 2023, Mr. Johnson and Assistant Manager Shawn Metheny met with the claimant about the videos. Mr. Johnson told the claimant that the videos needed to stop immediately, that they represented a conflict of interest and a violation of customer trust. Mr. Johnson referred to the handbook, but did not cite the specific policy. Mr. Crist was respectful during the meeting and stated that just trying to stay positive and get workers in a better mood. Mr. Crist denies that the employer told him to discontinue all video posts and asserts the employer instructed him to cease posting provocative content.

On November 15, 2023, the claimant posted a photo or video to TikTok that showed the claimant and a coworker inside a customer's home. The claimant appears to be dancing. The claimant is wearing a work shirt displaying the employer's logo. The photo or video included the written message, "Work been on my ass about TikTok'in lately... I aint hurting noone [sic].. My worst days are better than some of my coworker Best Days!!!!!" See Exhibit 18.

On November 20 and 30, 2023, the claimant posted a video to TikTok that depicts coworkers dancing inside a customer's house. The depicted employees are wearing sweatshirts bearing the ServiceMaster logo. See Exhibits 6 and 8.

On November 29, 2023, the claimant posted a video to TikTok that depicts the claimant and coworkers playing with a soccer ball in a customer's garage. See Exhibit 7.

On December 1, 2023, the employer's upper management team held a meeting during which they discussed the claimant's TikTok posts. The upper management team had been unaware of the videos prior to December 1, 2023. The employer proceeded with discharging the claimant on December 4, 2023, based on the TikTok posts.

Following his discharge from the employment, the claimant learned that a coworker was warned about a social media post but was not discharged from the employment. The claimant highlights the racial distinction between himself and the coworker. The employer highlights the difference in content. The coworker's post to Facebook referenced a jobsite being cold due to a lack of heat.

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.

...

See also Iowa Admin. Code r. 871-24.32(1)(a) (repeating the text of the statute).

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 Iowa Administrative Code rule 87124.32(4).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The

administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes a discharge for misconduct in connection with the employment. The employer's written policies included a social media policy that did not prohibit all social media posts pertaining to the employment. However, the social media policy existed in tandem with a customer confidentiality policy that included the following:

Information about the customer site damage and our work is not to be shared outside of work or with the general public. Employees are not to take photographs or videos at customer sites. Photographs, video, or comments related to customer sites are not to be posted or shared on social media or with people outside of work.

The employer appropriately notified the claimant of the confidentiality policy at the start of the employment and reminded the claimant of the policy during the November 13, 2023 meeting. The employer's policy prohibiting the sharing of customer information, including photos and videos of job sites, was reasonable. The policy placed the claimant on notice that he could be disciplined or discharged for violating the policy. After the employer discussed the issue with the claimant, the claimant unreasonably elected on four separate occasions to post additional content to TikTok that depicted the inside of a customer's home. The weight of the evidence does not support the claimant's assertion that the customers gave him permission to post videos of their homes. The claimant hedged on this assertion in his testimony by implausibly asserting that the permission to document services performed for insurance or employer recordkeeping purposes extended to permission to record and post horseplay or other similar content depicting the inside of customers' private residences. In the policy violations that followed the November 13, 2023, the customer's privacy interests and the employer's customer confidentiality policy trumped any argument of free speech. The evidence indicates a pattern of unreasonable refusal to comply with a reasonable employer directive. The claimant's conduct indicated willful and substantial disregard of the employer's interests and constituted misconduct in connection with the employment. The weight of the evidence fails to support the claimant's assertion of disparate enforcement. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The January 9, 2024 (reference 02) decision is AFFIRMED. The claimant was discharged on December 4, 2023 for misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

February 16, 2024
Decision Dated and Mailed

scn

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
6200 Park Ave Suite 100
Des Moines, Iowa 50321
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
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: 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.