

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICIA M FERREL
Claimant

APPEAL 16A-UI-05679-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 04/17/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 13, 2016 (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 7, 2016. Claimant participated. Employer participated through assistant manager Manuela Ferris. Club manager Bernie Ruggieri attended the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a cashier from April 1, 2015 and was separated from employment on April 15, 2016, when she was discharged.

Claimant was not following company policy, by not transferring 100 percent of the products. The employer has a written policy requiring cashiers to transfer 100 percent of a customer's products/items/merchandise from one cart to another cart. All of the items need to be transferred to avoid shrinking (e.g., customers shoplifting by hiding merchandise). By transferring the items, the cashiers are able to make sure every item is paid for. Claimant was aware of the requirement to transfer items from one cart to another cart. The employer also has a disciplinary policy that allows for three coachings and then a fourth offense results in discharge; the coachings do not have to be for the same policy violation.

On April 14, 2016, claimant was working her scheduled shift. Claimant did not transfer 100 percent of a customer's items. Claimant's immediate supervisor observed claimant did not transfer 100 percent of the customer's products. The employer also reviewed the video. Claimant had used her hand scanner to scan the product in the customer's cart, but did not transfer it. After reviewing the video, the employer approached claimant. Claimant admitted she did not transfer the items to a different cart.

On September 28, 2015 and December 17, 2015, claimant was given written coachings by the employer for not transferring 100 percent of the customer's items. Claimant was not given a copy but she did sign the coachings and did provide an action plan on how she is going to

prevent the incident from happening again. On February 24, 2016, claimant was given a third coaching for attendance. Claimant was warned any further violation of any policy may result in discharge.

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. Benefits resulting from claimant's employment with the employer are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that on April 14, 2016, claimant failed to transfer 100 percent of a customer's items from one cart to another cart pursuant to its policy after having been warned. Claimant's argument that the employer had a written policy that stated only if the customer had ten or more items did she have to transfer 100 percent of the customer's items is not persuasive. Ms. Browning testified that this policy only applied to the self-checkout lanes, and on April 14, 2016, claimant was not at the self-checkout lane, but at her register. Even if claimant's testimony about the policy is correct, it is still not persuasive. Claimant testified that the employer would periodically change the policy and require 100 percent transfer of customer's items regardless of the number of items when there was a period of high shrink. Claimant further testified that on April 14, 2015, it was a period of high shrink. Claimant had been warned for not following the employer's policy on two prior occasions.

The employer has presented substantial and credible evidence that claimant violated the employer's policy requiring 100 percent transfer of customer's items after having been warned. This is disqualifying misconduct. Benefits are denied.

DECISION:

The May 13, 2016 (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant is deemed eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

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