

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

KATHLEEN C BENNINGTON
Claimant

WALMART INC
Employer

APPEAL 24A-UI-05124-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/28/24
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

On May 28, 2024, the claimant filed an appeal from the May 22, 2024, (reference 01) unemployment insurance decision that denied benefits based on the determination that claimant was discharged from employment for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on June 14, 2024. Claimant, Kathleen C. Bennington, participated. Employer, Walmart Inc., participated through Coach Gabryelle Watkins. No exhibits were admitted.

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 began working for employer on June 20, 2017. Claimant last worked as a full-time cashier. Claimant was separated from employment on April 25, 2024, when she was discharged.

The employer has a customer theft policy that prohibits employees in claimant's role from asking customers about theft. The policy also prohibits employees from threatening physical harm or directing profanity at a customer. Finally, the employer has a policy that requires that employees be courteous with customers.

On April 20, 2024, claimant was working the self checkouts. One of the checkouts read an error code, so claimant investigated. She called the customer back over to the self checkout. She asked the customer if they had paid. The customer became offended and the two began to argue with raised voices. The customer asked how they could report claimant's conduct. Claimant provided the customer with information regarding how to find the lead. The customer went to customer service and made a report. As the customer was leaving, the claimant gestured after them with two raised middle fingers. The customer did not see the gesture. Two

other customers were in the area and may have seen the gesture but did not say anything about it.

Claimant sought out Lead Marissa and reported the incident, including confessing to raising her middle fingers in the direction of the customer. Marissa made claimant believe the issue was not a big one, and told claimant she would have the customer banned from the store.

On April 25, 2024, Watkins discharged claimant from employment for violating the employer's customer theft policy and using profanity with a customer.

Claimant had received one previous disciplinary warning for profanity with a customer. In that instance, which occurred at least a year ago, claimant and a customer engaged in a shouting match in which claimant cursed at the customer because he had made movements indicating he intended to assault claimant's daughter and grandson. Claimant does not remember being told that future similar incidents would jeopardize her employment.

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) and (d) provide:

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 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 even 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:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job

insurance benefits. Such misconduct must be “substantial.” *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee.

“The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment.” *Myers v. Emp’t Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). Vulgar language in front of customers can constitute misconduct, *Zeches v. Iowa Dep’t of Job Serv.*, 333 N.W.2d 735, 736 (Iowa Ct. App. 1983), as well as vulgarities accompanied with a refusal to obey supervisors. *Warrell v. Iowa Dep’t of Job Serv.*, 356 N.W.2d 587, 589 (Iowa Ct. App. 1984).

Every employer is entitled to expect civility and decency 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.” *Henecke v. Iowa Dep’t of Job Serv.*, 533 N.W.2d 573, 576 (Iowa App. 1995) (internal citation omitted). However, the use of profanity or offensive language is not automatically disqualifying for unemployment insurance benefits purposes. The “question of whether the use of improper language in the workplace is misconduct is nearly always a fact question... [and] must be considered with other relevant factors...” *Myers v. Emp’t Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). An Employment Appeal Board decision set forth six aggravating factors to be considered when examining an employee’s use of improper language: “(1) cursing in front of customers, vendors, or other third parties; (2) undermining a supervisor’s authority; (3) threats of violence; (4) threats of future misbehavior or insubordination; (5) repeated incidents of vulgarity; and (6) discriminatory context.” *Emp’t App. Bd. Hrg. No. 16B-UI-08787*, at *3 (Emp’t App. Bd. pub. Oct. 21, 2016) (citing cases). The Employment Appeal Board also suggests that the general work environment is a relevant consideration in analyzing profanity. *Id.*

The primary reason for concluding that claimant’s conduct constitutes disqualifying misconduct is that it was a repeated offense. Claimant had received a previous warning for using profanity with a customer and knew that doing so violated the employer’s policies. Despite this previous warning, she again used profanity, this time in the form of a hand gesture, with a customer. It is also relevant that this occurred in front of other customers. Though claimant believed they did not see the gesture, she cannot know that. The administrative law judge acknowledges claimant’s candor in the hearing when she admitted to wrongdoing. However, claimant knew better than to make profane hand gestures in front of customers because she had been warned about similar conduct in the past. This constitutes disqualifying misconduct. Benefits are denied.

DECISION:

The May 22, 2024, (reference 01) unemployment insurance decision is AFFIRMED. The claimant was discharged from employment on April 25, 2024, due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Alexis D. Rowe
Administrative Law Judge

June 17, 2024
Decision Dated and Mailed

ar/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:

**Iowa Employment Appeal Board
6200 Park Avenue 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> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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 se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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.