

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MAOSN STROWDER
Claimant

WALMART INC
Employer

APPEAL 20A-UI-00605-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/15/19
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(9) –Disciplinary Suspension
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the January 13, 2020, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 6, 2020. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Zondra Wilburn, front end coach.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant suspended for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began employment on April 18, 2018 and was employed full-time as a customer host until December 6, 2019 when he was suspended without pay.

The claimant last performed work on December 4, 2019. On December 5, 2019, he was arrested while off-duty and charged with forgery. On December 6, 2019, he notified the employer of his arrest and was placed on suspension, pending outcome of his charges.

The employer did not have any details about the exact charges or the disposition of charges, but stated the claimant as a customer host would have had duties related to security and cash handling, and could not work while the charges were pending.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,128.00, since filing a claim with an effective date of December 15, 2019. The administrative record also establishes that the unemployment insurance consultant, Lauren Kamplain, from Talx UCM Services/Equifax, attended the fact-finding interview. She had no details available except that the claimant was suspended, pending outcome of criminal charges (see Fact-Finding documents/administrative record).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is eligible for benefits while he was on a disciplinary suspension.

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Sheryl A. Cospers vs. Iowa Department of Job Service and Blue Cross of Iowa*.

For purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct must be resolved. 871 IAC 24.32(9).

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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was suspended for work-connected misconduct as defined by the unemployment insurance law.

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77-78.

The claimant was criminally charged with forgery while off-duty. The administrative law judge is persuaded the claimant knew or should have known his off-duty conduct could impact his employment. At the time of his suspension, there is no evidence he had entered a plea to the charges and was, therefore, entitled to the presumption of innocence. Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016) (citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)). Based on the

evidence presented, the administrative law judge concludes the employer has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning which led to his suspension. Benefits are allowed, provided he is otherwise eligible.

Because the claimant is allowed benefits, the issues of overpayment and relief of charges are moot at this time.

DECISION:

The January 13, 2020 (reference 01) unemployment insurance decision is reversed. The claimant was suspended from employment without establishment of misconduct. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

jlb/rvs