

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GREGORY I MISSMAN
Claimant

APPEAL 22A-UI-05959-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART ASSOCIATES
Employer

OC: 02/13/22
Claimant: Respondent (1)

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

Employer filed an appeal from the February 28, 2022 (reference 01) unemployment insurance decision that allowed benefits finding claimant was discharged on February 4, 2022 for no disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on April 18, 2022. Claimant did not participate. Employer participated through Judy Berry, Hearing Representative. Dennis Purcell, Assistant Manager, was a witness for employer. Administrative Law Judge David Steen observed the hearing. Employer's Exhibit 1 was admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed as a full-time Online Grocery Team Lead from July 6, 2021 until his employment with Walmart ended on February 4, 2022.

Employer has a progressive discipline policy that essentially gives employees "three strikes" before termination of employment. On December 6, 2021, claimant received a written warning for damaging a product and knowingly sending the damaged product to a customer. (Exhibit 1) The date of the incident is unknown. On January 1, 2022, claimant received a written warning for storming off and throwing a handheld on December 7, 2021. (Exhibit 1) The written warnings do not state that future violations of employer's policies or code of conduct may result in termination of employment. (Exhibit 1)

On January 21, 2022, claimant told a subordinate employee that she was a “bad girl” for not reporting for her scheduled shift. Claimant’s comment made the employee uncomfortable. The comment was overheard by coworkers who also felt uncomfortable. Claimant’s comment violates employer’s code of conduct to treat others with respect. Claimant was aware of the code of conduct because he received training on it during orientation and had access to it. On January 23, 2022, employer questioned claimant about his comments on January 21, 2022 and gave him a chance to explain. Claimant expressed that he was upset because the employee did not report to work as scheduled and admitted to calling the employee a “bad girl.”

On February 4, 2022, employer discharged claimant pursuant to its progressive discipline policy because the January 21, 2022 incident was claimant’s third strike.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes:

Iowa Code section 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 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.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp’t Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp’t Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant’s statement and employer’s statement must give detailed facts as to the specific reason for the claimant’s discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find employer's testimony about an incident in August 2021 to lack credibility because employer did not provide detailed information about the incident including the date it occurred, a description of claimant's conduct that employer found objectionable, or documentation of the event or resulting disciplinary action.

Employer discharged claimant for the sum of multiple issues over the course of claimant's employment. The final act was an unprofessional and inappropriate comment claimant made to a subordinate employee. Claimant had no warnings for similar conduct. Claimant's written

warnings for storming off and throwing a handheld and sending a customer a damaged product are not like a warning for unprofessional or inappropriate comments to coworker. Employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. The final act, without a prior warning for similar conduct, does not rise to the level of substantial misconduct. Employer has not met its burden of proving disqualifying, job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Because claimant's separation is not disqualifying, the issues of overpayment, repayment and charges are moot.

DECISION:

The February 28, 2022 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible. The issues of overpayment, repayment and charges are moot.



Adrienne C. Williamson
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April 22, 2022
Decision Dated and Mailed

acw/ACW