

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

JASON B AVERY
Claimant

WALMART INC
Employer

APPEAL 23A-UI-07596-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/25/23
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the July 24, 2023 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon a discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on September 8, 2023. The claimant participated personally. The employer participated through witnesses Albert Newman and Tayonni Walker. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records, including the fact-finding documents.

ISSUES:

Was the claimant's separation from employment disqualifying?
Was the claimant overpaid benefits?
Can the repayment of any 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: Claimant began working for this employer on May 3, 2000. He was employed as a full-time stocker. His last day physically worked on the job was June 24, 2023, when he was discharged.

On June 16, 2023, the claimant used the self-check out register. He completed an electronic survey that the customer in line in front of him failed to complete. He then finished his transaction and completed his own electronic survey. Claimant rated the experience as a 1 out of 5, with 1 being the lowest possible score, on both surveys.

The employer investigated this matter and determined that the claimant was the person who completed these two electronic surveys on June 16, 2023, through video and photographic evidence. The claimant spoke with Mr. Newman about this incident approximately one week prior to his discharge. Claimant acknowledged that he was the person in the photograph but stated that he did not remember completing the surveys. Claimant had not received any verbal

instructions stating that he was prohibited from completing electronic surveys prompted in the self-check out lane.

The employer believed that the claimant's actions of completing these two surveys were in violation of the employer's written policy against acting in the employer's best interests, which is part of the employer's written Code of Conduct. There was no written policy prohibiting an employee from completing electronic surveys in the self-check out register.

On December 9, 2022, the claimant had been issued a discipline for exceeding his break time. Because the claimant had received this previous discipline on December 9, 2022, the employer determined that the claimant's actions on June 16, 2023 should result in discharge rather than a lesser penalty.

The claimant's administrative records establish that he has received \$506.00 in unemployment insurance benefits during the one-week period ending July 8, 2023. The employer did not participate in the initial fact-finding interview via telephone as it did not receive a telephone call to participate from Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a & d provide in pertinent part:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 the 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 obligation to the employer. Misconduct by an individual includes but is not limited to all of the following: ...

The employer has the burden of proof in establishing disqualifying job-related misconduct.¹ In unemployment insurance benefits cases, the issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits.² What constitutes misconduct justifying termination of an employee and what

¹ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

² *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

misconduct warrants denial of unemployment insurance benefits are two separate decisions.³ Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.⁴ Such misconduct must be “substantial.”⁵

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.

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.⁶ The administrative law judge may believe all, part or none of any witness’s testimony.⁷ In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience.⁸ 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.⁹ Administrative agencies are not bound by the technical rules of evidence.¹⁰

A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant.¹¹ Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence.¹² I find the claimant’s testimony that he never received verbal instructions prohibiting him from completing electronic surveys at check-out to be credible.

The credible evidence establishes that the claimant did not engage in any final acts that were substantial and would rise to the level of job-related misconduct. The employer failed to identify any deliberate acts or omissions that constituted a material breach of the duties and obligations arising from the claimant’s employment contract. The separation from employment is not disqualifying and benefits are allowed, provided the claimant is otherwise eligible. Because benefits are allowed, the employer’s account may be charged for benefits paid.

³ *Pierce v. Iowa Dep’t of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

⁴ *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

⁵ *Id.*

⁶ *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007).

⁷ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

⁸ *Id.*

⁹ *Id.*

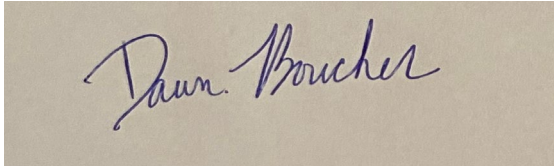
¹⁰ *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000).

¹¹ *Clark v. Iowa Dep’t of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002).

¹² *Gaskey v. Iowa Dep’t of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

DECISION:

The July 24, 2023 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant remains otherwise eligible. The employer's account may be charged for benefits paid.



Dawn Boucher
Administrative Law Judge

September 11, 2023
Decision Dated and Mailed

db/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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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. *There is no filing fee to file an appeal with the Employment Appeal Board.*

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 file a petition for judicial review in district court.

2. If you do not file 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 www.iowacourts.gov/efile. *There may be a filing fee to file the petition in District Court.*

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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. *No hay tarifa de presentación para presentar una apelación ante la Junta de Apelación de Empleo.*

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 no presenta una apelación de la decisión del juez ante la Junta de Apelación de Empleo dentro de los quince (15) días, la decisión se convierte en una acción final de la agencia y tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días. Puede encontrar información adicional sobre cómo presentar una petición en www.iowacourts.gov/efile. *Puede haber una tarifa de presentación para presentar la petición en el Tribunal de Distrito.*

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.