

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

CHRISTINA L SALYERS
Claimant

HY-VEE INC
Employer

APPEAL 23A-UI-02293-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/05/23
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Christina L. Salyers, filed an appeal from the February 22, 2023, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged for conduct not in the employer’s best interest. The parties were properly notified of the hearing. A telephone hearing was held on March 21, 2023 at 2:00 p.m. The claimant participated and testified.

The employer participated through Store Manager Brian Benz and Store Manager David Miller. Exhibits 1, 2, 4, 5, 6, A and B were received into evidence. One of the Employer’s Exhibits, proposed exhibit 3, was excluded because it was repetitive of exhibits A and B. The claimant’s remaining exhibits were excluded because they had not been sent to the opposing party to comply with Iowa Admin. Code r. 871-26.6(7).¹

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:

The claimant worked as a part-time aisles online clerk from September 23, 2023, until she was separated from employment on January 24, 2023, when she was terminated. The claimant’s immediate supervisor was Aisles Online Manager Kaitlyn Blomme.

The employer provided a copy of its equal employment opportunity and harassment policy. (Exhibit 4) The policy states that “all employees should be treated with dignity and respect and that all employees should be able to enjoy a work environment free from all forms of discrimination and harassment.” The employee is asked to sign and date an acknowledgement

¹ The rule states all documents or other items you want to submit as exhibits must be sent to the opposing party and the Appeals Bureau before the hearing date. Several audio items were not sent at least the day before which served as an independent ground for exclusion.

to “refrain from discrimination and harassment and help ensure that others do not engage in such conduct.” The claimant acknowledged receipt of the policy on September 23, 2021.

On January 6, 2022, the claimant spoke with Assistant Manager Mindy Fine and Store Manager Penny Wrage. The topic of conversation was that the claimant “had some words” with a coworker, Coletta Whensen. The claimant said she knew touching a coworker is not appropriate, but offered she may have bumped into Ms. Whensen. Ms. Fine and Ms. Wrage said if a similar incident occurred again, then the claimant could face more serious consequences. They characterized the claimant’s behavior as “unacceptable.”

On December 21, 2022, the claimant pulled down a picture of Ms. Blomme at the front of the store. The claimant was asked why she took down the picture. The claimant said she was making Christmas ornaments out of the picture. The two management officials told the claimant it was disrespectful and not to do it again.

On February 24, 2022, the claimant received her employee performance review. One row asks management the ranking of employees regarding “showing respect and courtesy to co-workers.” Ms. Fine wrote the following, “We are working on this and it seems to be getting better. Brush it off! Don’t say what you are thinking!” The employer provided a copy of this performance review. (Exhibit 5)

On January 13, 2023, Mr. Miller and Ms. Blomme received text messages from, at that point in time, an unknown phone number. Initially, Ms. Blomme was the recipient of the messages. The first message described her as a “shitty person” who “cannot stop telling lies.” The message added that Mr. Miller merely proposed to Ms. Blomme because she was pregnant. The message said Mr. Miller was cheating on Ms. Blomme just as her mother had cheated on her father. The messages continued with taunts such as, “I’m fucking your baby daddy” and referring to Ms. Blomme as a “dumb blonde” and a “[b]eauty school drop out.” In one message, the claimant refers to Ms. Blomme’s genitals. Around the same time, this person was sending text messages to Mr. Miller stating that she revealed the affair to Ms. Blomme. The employer provided copies of the text messages sent to Ms. Blomme. (Exhibit 1)

On January 24, 2023, the employer terminated the claimant’s employment. The employer provided pictures from caller identification verifying that the text messages sent on January 13, 2023 came from the claimant’s phone.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

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 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).

Iowa Code section 96.5(2)b, c and d provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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 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. 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 result 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 licenses, 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). 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). 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). 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).

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). However, "work-connected" should not be read to place the location or time of the conduct as the central issue. Rather what matters is if the misconduct is "work-connected." *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). See also *Pongdara v. Emp. Appeal Bd.*, 759 N.W.2d 813 (Iowa Ct. App. 2008) 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.

As stated above, the administrative law judge finds the claimant was the one who sent the text messages on January 13, 2023. He raises the issue of whether the conduct was sufficiently work-connected on his own volition as it appears to him to be strongest argument for the claimant regarding eligibility. Nevertheless, the administrative law judge finds the conduct was sufficiently work-connected to be disqualifying.

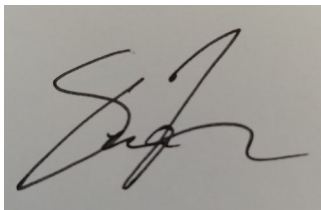
While it is true that the claimant sent these text messages to Ms. Blomme and Ms. Miller while off the clock and away from the employer's premises, the final incident was merely a continuation of a previous pattern targeting Ms. Blomme. The claimant's relationship to Ms. Blomme developed from their time together at work. We must remember that the test of whether something is work-connected is not merely a formulation of time and place, it is a matter of employer expectations and employee notice of those expectations. Given these observations, the administrative law judge finds the employer has met element one of showing a nexus to the claimant's employment.

Second, the conduct undeniably impacted the employer's interests. Ms. Blomme supervises the claimant. This relationship and Ms. Blomme's personal relationship to Mr. Miller was undeniably impacted by this scheme. The behavior shocks the conscience in its cruelty to Mr. Miller and Ms. Blomme. Adultery is one of the most serious concerns a couple can have and projecting those concerns falsely on them before a slated wedding could have lasting damage. If the employer retained the claimant with the knowledge that she engaged in such behavior, it is difficult to believe the claimant would have been within reasonable restraints such that it could derive value from her work.

Third, the conduct was violative of the employer's policy regarding equal opportunity and harassment and done with the intent that the employer's interests would suffer. While the administrative law judge asked questions about how broadly the employer's anti-harassment and discrimination policy was interpreted, he finds the employer's rationale compelling. The text messages sent on January 13, 2023, likely could be construed as an attempt at another form of harassment, criminal harassment.² Benefits are denied.

DECISION:

The February 22, 2023, (reference 01) unemployment insurance decision is AFFIRMED. The claimant was discharged from employment 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.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

April 5, 2023
Decision Dated and Mailed

smn/scn

² See Iowa Code 708.7.

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.

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:

**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.

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.