

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JESSICA M KIRCHOFF**  
Claimant

**WAL-MART STORES INC**  
Employer

**APPEAL 17A-UI-00522-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/11/16**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 10, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 2, 2017. Claimant participated. Employer participated through Assistant Manager Megan Merryman.

**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 was employed full-time as a hardware sales floor associate from August 19, 2014, and was separated from employment on December 8, 2016, when she was discharged.

The employer has a written progressive disciplinary policy that provides for three written warnings and then the fourth incident results in discharge. Warnings are effective for one year from the most recent warning.

As an assistant manager, Ms. Merryman is two levels above claimant and a department manager is one level above claimant, but one level below an assistant manager.

On December 8, 2016, claimant was working her scheduled shift. After claimant clocked in, she crossed paths with Ms. Merryman. Ms. Merryman told claimant that there were two carts that she needed to work that day. Ms. Merryman also told them where the carts were located. Claimant acknowledged that she heard Ms. Merryman. Claimant then approached a department manager and asked the department manager what to do. The department manager gave claimant a different task from what Ms. Merryman gave claimant. The department manager told claimant she could work on the department manager's task until Ms. Merryman tells her what to do. Claimant then began working on the department manager's task. During her shift, claimant did not work on the carts that Ms. Merryman assigned her to work on. Shortly

before the end of claimant's shift, Ms. Merryman brought claimant in to discipline her for insubordination (not following Ms. Merryman's directions by not working on the carts). Because claimant had three prior written warnings that were still active and this would be her fourth written warning, this incident resulted in claimant's discharge. When Ms. Merryman told claimant that she was being disciplined, she wanted to talk to the store manager, but the store manager was not available. Claimant told Ms. Merryman that she was busy on the registers and could not work on the carts. Claimant was not on the registers her entire shift and she had time to work on the carts, especially at the beginning of her shift.

On November 29, 2016, claimant received a third level written warning for poor customer/member services. Claimant was warned that her job was in jeopardy and another incident would result in discharge. Claimant signed for the written warning. Claimant received the warning because she had not responded to the front to be a cashier in a timely manner. Multiple managers had spoken to claimant about responding to the front. On January 23, 2016, claimant received a second level written warning for poor job performance. Claimant signed for the warning. On November 28, 2015, claimant received a first level written warning for absenteeism. Claimant did not sign the warning, but was aware of the warning. The employer does not require a signature for a first level warning.

#### **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. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. After claimant clocked in to start her shift, Ms. Merryman told claimant to work on two carts and instructed her on where the carts were located. Claimant acknowledged that she heard Ms. Merryman. Claimant then proceeded to ignore Ms. Merryman's instructions and did not work on the carts during her shift, despite having opportunities to work on the carts. On November 29, 2016, claimant had been given a third level warning when she did not listen to her managers and report to the front in a timely fashion; she was warned that her job was in jeopardy.

The employer has presented substantial and credible evidence that claimant failed to follow an assistant manager's directions (working on two carts) after having been warned. This is disqualifying misconduct. Benefits are denied.

**DECISION:**

The January 10, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs