

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

ARISTA V EVERSON
Claimant

APPEAL 23A-UI-02357-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

**OC: 01/22/23
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge
Iowa Admin. Code r. 871-24.32(1)a – Discharge
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Wal-Mart Inc., filed an appeal from the February 17, 2023, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion she was discharged but willful misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on March 22, 2023. The claimant participated and testified. The employer participated through Member Services Fresh Manager Liam Walsh and Unemployment Insurance Benefit Representative Kevin Dyer. Official notice was taken of the agency records. Exhibits 1, 2, 3, 4 and 5 were received into the record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

FINDINGS OF FACT:

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

The claimant worked as a full-time member specialist from August 16, 2016, until she was separated from employment on January 26, 2023, when she was terminated. The claimant worked from 7:30 a.m. to 4:00 p.m. Tuesdays through Sundays. The claimant's immediate supervisor was Member Services Fresh Manager Liam Walsh.

The employer has a set of work rules accessible through the employer's Intranet, One Walmart. One of those policies is labeled respect for the individual. The policy prohibits discrimination and harassment based on characteristics protected by state and federal law. It also asks employees to treat others how they would like to be treated. The employer provided a copy of this policy. (Exhibit 2) The employer also provided a copy of its disciplinary action policy. The disciplinary action policy outlines progressive discipline with the final stage being called a "disciplinary

action-red,” which constitutes a final warning. Any additional actions after receiving a disciplinary action-red could result in termination. The employer provided the claimant’s training history on the various policies. (Exhibit 3)

In April 2022, another associate and the claimant had an altercation in the parking lot as the claimant was going to her car. The associate called the claimant a “bitch” and threatened the claimant with the phrase, “Catch you outside and see what happens?” The claimant did raise her voice during this interaction. The claimant was not disciplined because of this altercation. The other associate was terminated.

On September 9, 2022, the claimant asked to relieve another associate at the door. The claimant believed the associate had been too rude to her during this interaction. The claimant reported these concerns back to her supervisor and Mr. Walsh. Mr. Walsh spoke with the associate. Although Mr. Walsh created a disciplinary action-red form, he did not present it to the claimant because she raised concerns with the other associate’s behavior.

On January 24, 2023, the claimant approached a floor supervisor regarding what another associate, Nikki Cox, telling customers they would immediately see a credit on their account of \$30.00 that same day. The claimant was concerned that Ms. Cox was misleading customers because her understanding was that this credit would not appear until their first billing statement for the credit card. This floor supervisor told the claimant she was mistaken, and she should adopt Ms. Cox’s script for speaking with customers. The claimant then saw Mr. Walsh was walking past. The claimant stopped Mr. Walsh and gave him the same description of events. Mr. Walsh said Ms. Cox was not wrong because they would see the \$30.00 off their receipt. The claimant asked, “Why is it okay for Ms. Cox to give them false information.” The claimant’s voice was normal during this interaction.

On January 26, 2023, the employer terminated the claimant due to the incident occurring on January 24, 2023.

The following section of the findings of fact display the findings necessary to resolve the overpayment issue:

The claimant has received \$2,405.00 in unemployment insurance benefits since she separated from the employer.

On February 10, 2023, Iowa Workforce Development sent a notice of factfinding to the parties informing them of a fact-finding interview on February 16, 2023. The claimant participated personally. The employer registered a number for a third-party unemployment insurance representative with no personal knowledge or experience of the claimant’s separation. The third-party unemployment insurance representative did not answer the call or respond to the voicemail that was left.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged, but the employer has failed to meet its burden to show the discharged was caused by disqualifying misconduct. The overpayment issue will not be evaluated because the claimant is entitled to benefits.

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).

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 her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

The administrative law judge notes the employer did not provide witness testimony or any of the written statements it said existed regarding alleged January 25, 2023, incident. Instead, Mr. Walsh provided a second or possibly third hand account that provided no context for what was supposedly said. The pattern is similar for the incident on January 24, 2023. The claimant described why she believed her peer, Ms. Cox, was lying to customers. She provided a step-by-step description of the event as the conversation moved from person to person. In contrast, Mr. Walsh alleged the claimant was yelling so that the entire front of the store could hear her. Given this description of a full-on tumult, it does not help Mr. Walsh's credibility that he described her as yelling that Ms. Cox was a liar and did not tell "members the truth." Especially, given that nothing provided by way of exhibits describes this situation in the slightest.

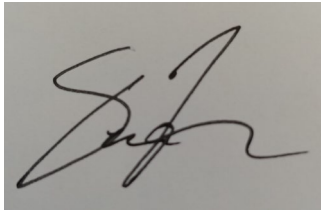
Nevertheless, even if the administrative law judge found Mr. Walsh's description of the January 25, 2023 incident credible, he diminished the importance of it in causing the claimant's discharge.

As to the January 24, 2023 incident, the administrative law judge finds the claimant merely tried to correct what she felt was against the interests of the employer and other customers. Perhaps

she should have worded this more precisely to her floor supervisor or Mr. Walsh, but the reason for her initiating this conversation should be seen as mitigating. That is because it is to the employer's interest that information be conveyed in an accurate way to customers. The employer's portrayal of the claimant violating the rule are similarly mitigating. The employer did not even attempt to rebut the claimant's claim that she did not initiate the incident in April 2022 or on September 9, 2022. The employer has failed to meet its burden to show the claimant engaged in disqualifying misconduct. Benefits are granted, provided she is otherwise eligible. The overpayment issue will not be evaluated because the claimant is entitled to benefits.

DECISION:

The February 17, 2023, (reference 01) unemployment insurance decision is AFFIRMED. The claimant was discharged for a non-disqualifying act. Benefits are granted, provided she is otherwise eligible for benefits. The overpayment issue will not be evaluated because the claimant is entitled to benefits.



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

March 27, 2023
Decision Dated and Mailed

smn/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.

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.