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

RODNEY D BROWN Claimant **WALMART INC.** Employer	**APPEAL 22A-UI-14711-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/19/22** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Rodney D. Brown, the claimant/appellant, filed an appeal from the Iowa Workforce Development (IWD) July 8, 2022 (reference 01) unemployment insurance (UI) decision that denied REGULAR (state) UI benefits because of a June 20, 2022 discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on September 8, 2022. Mr. Brown participated personally. The employer participated through Monica Sagers, coach.

ISSUE:

Did the employer discharge Mr. Brown from employment for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Brown began working for the employer in May 2021. He worked as a full-time cart-pusher. His employment ended on June 20, 2022.

Sometime in June 2022, a female employee filed a complaint with the employer against Mr. Brown alleging that Mr. Brown made sexual remarks to her, including suggesting that they have sex, Mr. Brown told her to take a video of him so she should watch it at home and play with herself, and in one instance Mr. Brown a banana in front of his genitals and asked her if she wanted a banana. The employer reviewed video footage and saw Mr. Brown put a banana in front of his genitals. On June 8, the employer told Mr. Brown about the allegation. Mr. Brown told the employer that the co-worker was leading him on. Mr. Brown stated that he had offered the co-worker a banana, but he did not put the banana in front of his genitals. Mr. Brown also stated that he did not say the co-worker should play with herself but he did not deny that he told the co-worker to take a video of him so she should watch it at home.

During the hearing, Mr. Brown testified that the full context of what happened is that the co-worker had commented to him that he had the perfect color skin, to which he replied that his skin color came from working outside. The co-worker then asked Mr. Brown to put his hat on

because she thought he looked good in the hat and told Mr. Brown that she wanted to take a picture of him wearing his hat. Mr. Brown replied that she should take a video of him so she could watch it at home. Mr. Brown denied saying the co-worker could/should play with herself while watching the video. Mr. Brown admitted that he had offered the co-worker a banana and he explained that he did not put the banana in front of his genitals but his hands, including the hand holding the banana, went around his pocket area. He explained that everyone's hands naturally go to one's pocket area.

The employer's policy prohibits sexual harassment. The employer gave Mr. Brown a copy of the policy on, or about, his hire date. The employer also posted posters in the store about the policy and required employees to participate in online training. The employer sent the complaint and their investigation to the corporate office for resolution.

About two weeks later, another female employee filed a complaint with the employer against Mr. Brown alleging that Mr. Brown constantly made sexual remarks to her as he walked by and in one instance Mr. Brown told her that most men his age cannot get a "hard-on," but he can. The employer told Mr. Brown about this allegation, and he admitted to saying this to the co-worker. The employer sent the second complaint and their investigation to the corporate office for resolution.

During the hearing, Mr. Brown testified that the full context of what happened is that the co-worker is that the co-worker had built him up by yelling "hello" to him across the store and yelling "Rodster, you're our hero." Mr. Brown explained that "Rodster" has been his nickname since he was a child, and the co-workers knew about the nickname because he told them either verbally or by wearing a name tag with the name "Rodster" on it. Mr. Brown them went to the co-worker and the co-worker asked him why he is dating a young woman, to which Mr. Brown replied that he is divorced, more sexually capable than other men his age and he can get a "hard-on" even though other men his age cannot.

On June 20, the employer terminated Mr. Brown's employment for violating the employer's sexual harassment policy. Mr. Brown argues in his appeal letter that he is the "victim" and that he had "...NOT solicited sex from either of these girls nor any other Walmart employee. Ever." Mr. Brown argues that the two co-workers led him on.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Mr. Brown from employment for job-related misconduct.

On June 16, 2022, Governor Reynolds signed into law House File 2355, which among other things, amended Iowa Code 96.5(2) to redefine misconduct and to list specific acts that constitute misconduct. The bill did not include an effective date and so it took effect on July 1, 2022. *See* Iowa Const. art. III, § 26; Iowa Code § 3.7(1).

There is a strong presumption in U.S. jurisprudence against legislation being applied retroactively. “The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). This is in part because “elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly....” *Landgraf v. USI Film Prod.,* 511 U.S. 244, 265 (1994).

It would be fundamentally unfair and inconsistent with widely accepted legal principles to apply the amended Iowa Code 96.5(2) to the conduct at issue in this matter, which occurred before HF 2355 went into effect on July 1, 2022. As such, the amended Iowa Code 96.5(2) effective July 1, 2022 should not be applied to the conduct at issue here, and instead Iowa Code 96.5(2) as it existed at the time of the conduct will be applied.

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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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 the claimant from employment, 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). 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).

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*.

The findings of fact show how the administrative law has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considered the applicable factors listed above, and used his own common sense and experience.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Mr. Brown repeatedly sexually harassed co-workers in violation of the employer's policy. Mr. Brown's explanation that he was not sexually harassing the co-worker, but his hands simply went to his pocket area while he was holding a banana and asking a co-worker if she wanted a banana is not persuasive. Mr. Brown's explanation that he was not sexually harassing a co-worker when he told a co-worker, at work, about his erections in response to her question about why he was dating a young woman is also not persuasive.

In times past, sexual harassment may have been understood to only include a male co-worker explicitly asking a female co-worker for sex. Thankfully, that is no longer the case. The employer has established that Mr. Brown engaged in misconduct by violating its sexual harassment policy. Benefits are denied.

DECISION:

The July 8, 2022 (reference 01) UI decision is AFFIRMED. The employer discharged Mr. Brown from employment for job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Daniel Zeno
Administrative Law Judge

October 6, 2022
Decision Dated and Mailed

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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 adquiera 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.