

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MAMIE M BENGENCE
Claimant

WAL-MART STORES INC
Employer

APPEAL 17R-UI-11899-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/10/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 26, 2017, (reference 01) unemployment insurance decision that denied benefits based on her discharge for failure to follow instructions in the performance of her work. The parties were properly notified of the hearing. A telephone hearing was held on December 8, 2017. The claimant participated with her non-attorney representative Dribo Kahulumbnba and with the assistance of a French language interpreter from CTS Language Link. The employer participated through Assistant Manager Olivia Robbins. Also present on behalf of the employer, but not testifying, was Brent Ponce.

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 part time from November 11, 2015, until this employment ended on September 7, 2017, when she was discharged. Claimant was working as a cashier at the time of her separation.

On August 26, 2017, claimant began a new position as a cashier. Claimant had previously been working in another area, but had requested a reasonable accommodation due to a medical condition which was aggravated by the conditions of her prior position. Robbins testified claimant was given a selection of jobs to choose from and selected the cashier position from that list. Robbins further testified that the employer was not concerned about claimant's English proficiency, as the store actually has a large French-speaking clientele. Robbins testified, on August 26, when she was to start her new position, claimant refused to do the required job training when asked. Claimant instead attempted to work in her old position, which was no longer available to her. Claimant was subsequently written up for refusing the training and only then trained as instructed. Robbins testified the next day claimant was scheduled to work, August 30, 2017, she again refused to perform her cashier duties and was written up. Claimant refused to sign this warning. Claimant's next scheduled shift was September 7, 2017.

Robbins testified claimant again refused to perform her cashier duties and was written up for a third time. As part of the third write up, employees are required to write an action plan to correct the behavior or face termination. Robbins testified claimant refused to come up with an action plan or sign the third written warning. Robbins testified she advised claimant if she would not write the plan or sign the warning she would be discharged. Claimant continued to refuse and was subsequently discharged for insubordination. Robbins testified that with all three coachings, another staff member was present to interpret all coaching and discipline.

Claimant denied refusing to complete her new job duties. Claimant admitted she accepted the cashier position, but testified she believed the employer was trying to set her up for failure by transferring her to the position. Claimant admitted that she refused to sign the coaching and disciplinary documents, but testified this was because the documents were in English and she did not want to sign them without taking them home to translate them. Claimant at times denied that an interpreter was present at all for the disciplinary coachings, and at other times admitted an interpreter was present, but did not translate the documents she was being asked to sign. Claimant admitted, on September 7, 2017, that the interpreter told her if she did not sign the written warning she would be discharged, but denied the interpreter translated the document for her. Upon further questioning, the claimant testified she never requested the interpreter to translate the document. Claimant testified she believes her discharge was pretext for discrimination against her based on her race, nationality, and reasonable accommodation request. The employer denied this was the case and testified it currently employs other individuals in claimant's protected bases.

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.

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.

871 IAC 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 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 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.*

There are several facts on which the employer and claimant's recollection of events differ. Robbins provided consistent testimony throughout the hearing. Claimant's testimony, on the other hand, was often contradictory, especially on the issue of whether an interpreter was present for the disciplinary coachings. 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 employer's version of events to be more credible than the claimant's recollection of those events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Failure to sign a written reprimand acknowledging receipt constitutes job misconduct as a matter of law. *Green v Iowa*

Dep't of Job Serv., 299 N.W.2d 651 (Iowa 1980). The employer has presented substantial and credible evidence that claimant continued to refuse to perform her assigned job duties or sign written disciplinary action after having been warned that failure to do so would result in termination. The claimant testified she wanted to be able to understand what the document said prior to signing it. This request is wholly within reason and claimant should be afforded the opportunity to read and understand what she is signing. However, claimant was offered that opportunity through the employer's provision of an interpreter at all stages in the disciplinary process. It is understandable that claimant was frustrated with the situation, and her supervisor, and the frustration was likely made worse by the language barrier. However, claimant's decision to either refuse the interpreter offered to her, or to ignore the employer's directive as given through the interpreter was not reasonable under the circumstances. Since she was told she must sign the document to continue working, her refusal of the reasonable request was insubordinate and is considered misconduct. Benefits are denied.

DECISION:

The September 26, 2017, (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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs