IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MERCEDES M CUNNINGHAM Claimant **WALMART INC** Employer	**APPEAL 18A-UI-03276-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/18/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Mercedes M. Cunningham, filed an appeal from the March 6, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 2, 2018. The claimant, Mercedes M. Cunningham participated personally. Claimant Exhibit A was admitted into evidence. The employer did not participate. Employer Exhibit 1 (Employer proposed Exhibits) and Exhibit 2 (Letter of non-participation) were admitted into evidence also. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 was employed full-time as an asset protection associate since 2014 and was separated from employment on February 20, 2018, when she was discharged.

In her capacity as an asset protection associate, the claimant would investigate and apprehend potential shoplifters in the store, using the employer's AP 09 policy. In order to apprehend someone, the claimant stated she was required to follow five steps: The first step was to watch the individual select the item(s) through visual inspection or watching cameras in the store. Then the individual must conceal the item and the associate must verify it is still concealed. The associate must verify the item is not purchased and the individual must then past the final point of sale (or opportunity to purchase the item) before being apprehended. If an individual went into a fitting room or restroom, it would break the chain of custody, inasmuch as the associate could no longer verify the item was still concealed with the individual (versus trashed, discarded or ditched) and they must begin steps all over again. Prior to separation, the claimant had no warnings related to improper handling of apprehensions or investigations.

In addition to the steps listed within the AP 09 policy, an asset protection associate was also responsible for having a witness during the apprehension. In 2017, the claimant served as the witness to an assistant store manager, who apprehended an individual who removed three cans

of “canned air”, concealed them in her purse and was observed “huffing” them in the restroom. Due to an unrelated situation in the store, law enforcement was already on the premises at the time, and with the manager and claimant, confronted the individual in the restroom. The claimant nor the assistant manager was issued any discipline for participating in a “restroom” apprehension.

The final incident occurred on February 10, 2018, when the claimant was working with two asset associates, Andrea and Drew. Andrea observed two minor girls removing make up from the shelves and concealing the items. She began following the girls who went in the restroom. Andrea asked the claimant to be her witness for apprehension. Both Drew and the claimant questioned whether Andrea should proceed with the apprehension since the girls were out of sight by entering the restroom, but the claimant agreed to serve as a witness. Andrea was able to confront and retrieve the items she believed had been stolen. The claimant was then informed she was being investigated because she had allowed Andrea to complete an apprehension or stop that was not in compliance with policy AP 09. The claimant and Andrea were peers and the claimant had no management role over Andrea or other team members. She was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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.
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> 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 Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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*. Assessing the credibility of the claimant and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The employer in this case has a reasonable five step policy for apprehension of shoplifters, which includes keeping them in sight at all times. Employees are trained to restart the steps of the process if they lose sight of the individual being observed, including if they go into a fitting room or bathroom, because the merchandise is no longer in sight and could have been dumped or disposed of in the interim. In this case, the claimant was discharged after "allowing" a co-worker to apprehend two potential shoplifters in a manner that did not comply with the employer's AP 09 policy. Specifically, the asset protection associate apprehended the individuals in a restroom, which is against employer policy. The claimant was not in a position of authority in which she could issue a directive or warning to the associate for any non-compliance.

Based on the evidence presented, the administrative law judge concludes at most the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Specifically in this case, the claimant had previously engaged in the same conduct for which she was discharged in 2017, with a manager completing the apprehension and was not warned. The administrative law judge is not persuaded the claimant could have reasonably anticipated she would be discharged for her involvement as a witness in the February 10, 2018 apprehension. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The March 6, 2018, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn