

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LYNN SINDELAR
Claimant

WALMART INC
Employer

APPEAL 20A-UI-10343-J1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/07/20
Claimant: APPELLANT (2)

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

STATEMENT OF THE CASE:

On August 28, 2020, the claimant filed an appeal from the August 21, 2020, (reference 01) unemployment insurance decision that denied benefits based on misconduct. The parties were properly notified about the hearing. A telephone hearing was held on October 9, 2020. Claimant participated and was represented by attorney Barrett Gipp. Employer participated through Joanne Homan, Front End Coach (Manager) and Barbara Hamilton, Hearing Representative. Employer's Exhibits E 1 - E 5b were admitted into the record.

ISSUE:

Did claimant commit job related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on August 15, 2016. Claimant last worked as a part-time cashier. Claimant was separated from employment on June 5, 2020, when terminated for pushing a shopping cart into a customer.

Ms. Homan testified that she received a customer complaint about claimant pushing a shopping cart into a customer on March 25, 2020. Ms. Homan testified she reviewed a video of the incident a couple of days after the event as well as other members of management who decided to terminate claimant for gross misconduct. Ms. Homan testified that she saw on the video claimant talking to a customer and in about a minute, claimant reached with her left arm to shove the cart back so that claimant could clean the card reader at her station. Ms. Homan said the cart hit the customer.

Claimant was warned on May 6, 2020 for an incident of May 5, 2020. Claimant spoke to a customer in line about the fact he was not wearing a mask. The customer reported claimant was yelling. (Ex. E p. 2a) The employer recorded two other incident concerning claimant's interaction with customers on May 20 and May 22, 2020. (Ex. E p. 3a) The claimant was given a disciplinary action (DA) due to a letter sent to the president of Walmart for yelling at a customer. Ms. Homan

noted she and other staff had heard claimant yelling. On May 22, 2020 claimant was considered to be rude when she asked a customer why she was not wearing a mask and not accepting help of another customer when the customer was trying to help her. (Ex. E3 p.1). Claimant was not told of these incidents until she was discharged due to the March 25, 2020 cart incident on June 5, 2020. Claimant was going to receive a written warning for the May 20 and May 22, 2020 incidents. Before she could be given the warning she was terminated on June 5, 2020 for the May 25, 2020 incident. (Ex. E, p. 1)

The claimant testified that she does not intend to yell at any one. Claimant was in a significant car accident many years ago and is not able to control her voice modulation. Ms. Homan agreed that claimant had difficulty controlling her voice when she is under stress. Claimant has a brace on a leg and very little use of her right arm due to her car accident. Claimant had a collapsed lung and was told that Covid-19 could be more dangerous for her. Cognitively, claimant appears slightly impaired. Claimant demonstrate through her testimony that she speaks much louder than most when she is talking. Claimant testified she did not deliberately push the shopping cart into a customer on May 25, 2020. Claimant said she did push the cart so she could get to the card reader to clean the card reader between customers.

REASONING AND CONCLUSIONS OF LAW:

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:

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 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.

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).

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's 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 justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 is not 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).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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."

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The claimant received a warning for the May 5, incident. The claimant was to receive a written warning for the May 20 and May 22, 2020 incidents and was not going to be discharged..

The employer stated that claimant was seen pushing a shopping cart into a customer deliberately in a video. Claimant was not allowed to see the video. The video was not offered by the employer at the hearing. Claimant testified she pushed the cart aside to access the card reader so she could clean it between customers. That this incident was the reason claimant was discharged

When relevant evidence is within the control of a party whose interest is affected, a court may infer that the evidence, if not produced, would be unfavorable to that party. *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 271 (Iowa 1991); *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682, 685 (Iowa 1976); *Quint-Cities Petroleum Co. v. Maas*, 259 Iowa 122, 127, 143 N.W.2d 345, 348 (1966). The administrative law judge drew that inference here, and we find no error in doing so. The evidence in question had been available to UPS; the evidence was not produced, and the explanation tendered by UPS for failure to produce it was found by the administrative law judge to be insufficient.

Hamer v. Iowa Civil Rights Com'n, 472 N.W.2d 259, 262 (Iowa, 1991)

Claimant demonstrated through her testimony that her manner of speaking can be considered yelling. This is due to a medical condition. Claimant was unartful in raising her concerns about customers not wearing masks and may not be very good at customer service. The employer did not offer the video, a critical piece of evidence, to show a deliberate act or accident. As the employer did not produce this evidence, I assume that it does not support a finding of a deliberate or reckless act on behalf of the claimant.

I find that the employer has failed to show that claimant committed misconduct as defined by Iowa unemployment law. I find claimant was discharged for no disqualifiable reason.

DECISION:

Regular Unemployment Insurance Benefits Under State Law

The August 21, 2020, (reference 01) unemployment insurance decision is reversed. Benefits are payable, provided claimant is otherwise eligible.



James F. Elliott
Administrative Law Judge

October 13, 2020
Decision Dated and Mailed

je/scn