

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

RANDY L CLARK
Claimant

WALMART INC.
Employer

APPEAL 23A-UI-03504-DZ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/19/23
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

Walmart Inc., the employer/appellant,¹ filed an appeal from the Iowa Workforce Development (IWD) March 22, 2023 (reference 01) unemployment insurance (UI) decision. The decision allowed Mr. Clark REGULAR (state) UI benefits because IWD concluded the employer dismissed him from work on February 17, 2023 for a reason that did not disqualify him from receiving UI benefits. The Iowa Department of Inspections and Appeals UI Appeals Bureau mailed notices of hearing to the employer and Mr. Clark. The undersigned administrative law judge held a telephone hearing on April 17, 2023. The employer participated through Karla Raney, store manager and Kevin Dyer, Equifax representative. Mr. Clark did not participate in the hearing. The undersigned took official notice of the administrative record and admitted Employer's Exhibit 1 as evidence.

ISSUES:

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

Did IWD overpay Mr. Clark UI benefits?

If so, should he repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Clark began working for the employer on May 19, 2007. He worked as a full-time cart associate. His employment ended on February 17, 2023.

On January 26, 2023, an employee (Employee A) reported to Mr. Clark's manager that Mr. Clark had been sexually harassing her. Employee A reported that that day Mr. Clark asked her about dating him and talked about the 35-year age gap between the two of them. Employee A also reported that in the past Mr. Clark had a cane and told her to bend over to see if the cane fits, stared at her chest, pointed out that she had a shirt on under her jacket, and asked her to

¹ Appellant is the person or employer who filed the appeal.

unzip her jacket so he could see her muscles. Employee A also reported that in the past Mr. Clark told her something to the effect of “Let’s take your temperature but let’s talk about where we’re going to take it” and then put his hand on her forehead, and Mr. Clark slapped her on the buttocks with lanyard. Employee A reported that all of this made her uncomfortable. There were no witnesses to any of the incidents. The employer’s policy prohibits sexual harassment. Mr. Clark acknowledged receiving a copy of the policy on May 20, 2007, and again on August 26, 2021.

The employer opened an investigation. On January 27, Mr. Clark’s manager interviewed him about the allegations. Mr. Clark told the employer that he had talked with Employee A about the age gap between the two of them, and he had also talked with Employee A about her jacket because of the weather. Mr. Clark stated that he did not consider the conversation inappropriate. Mr. Clark denied making any statements about a cane.

On February 15, Ms. Raney interviewed Mr. Clark. Another manager witnessed the interview. Mr. Clark again stated that he had talked with Employee A about the age gap between the two of them, and about her jacket because of the weather. Mr. Clark initially denied hitting any employee with a lanyard then stated that he and other unnamed employees would hit each other with their lanyards as a joke. Mr. Clark denied making comments to any employee about taking their temperature. In response to Ms. Raney asking Mr. Clark if he remembered bringing a cane to work, Mr. Clark stated that he did but he did not say anything about putting the cane anywhere. Ms. Raney testified at the appeal hearing that she found it odd that Mr. Clark brought up the issue of putting the cane somewhere when she only asked him if he remembered bringing the cane to work.

In August 2020, the employer had given Mr. Clark a written warning for being “...overly aggressive in not letting the situation be done” after asking another employee to go on a date with him.² Ms. Raney could not provide any additional details about what Mr. Clark said or did in this incident. In June 2021, the employer had given Mr. Clark a written warning for making “...inappropriate comments towards [another employee] that make [the employee] uncomfortable.”³ Ms. Raney could not provide any additional details about what Mr. Clark said or did in this incident.

Based on the two previous warnings, the employer concluded that Employee A’s January 26 allegations were substantiated. The employer concluded that Mr. Clark should have knowN to not sexually harass employees because of the written warnings the employer had given him. The employer terminated Mr. Clark’s employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes the employer discharged Mr. Clark from employment for a reason that does not disqualify him from receiving UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide:

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:

² Employer’s Exhibit 1.

³ *Id.*

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.

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 such 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.

The employer has the burden of proof in establishing disqualifying job misconduct.⁴ 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.⁵ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁶

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the employer received allegations that Mr. Clark was sexually harassing Employee A. There were no witnesses or other evidence to corroborate the allegations and Mr. Clark denied the allegations. But the employer ended Mr. Clark's job because the employer had given him two written warnings in the past about similar allegations. The employer could not provide any details about those allegations other than the general statements that were in the write-ups.

The most recent incident leading to the employer discharging Mr. Clark must be a current act of misconduct to disqualify him from receiving UI benefits. The most recent act for which the employer terminated Mr. Clark's employment – the January 26 allegations from Employee A – without more, does not establish a current act of misconduct on the part of Mr. Clark. The employer's previous conclusions that Mr. Clark violated its policy and the two writes up do not establish that Mr. Clark sexually harassed Employee A. The employer has failed to meet its burden of proof to establish a current act of disqualifying, job-related misconduct on the part of Mr. Clark. For this reason, benefits are allowed.

This decision is not about whether the employer has the right to terminate employees for violating its policies and procedures. The employer does. This decision is about Mr. Clark's

⁴ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

⁵ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁶ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

eligibility for UI benefits and the analysis of UI eligibility does not end with what the employer has to right to do. Based on the evidence presented in this case and the law, this decision holds that the employer did not meet its burden of proof to establish that Mr. Clark's conduct leading to separation was misconduct under Iowa law.

Since Mr. Clark is eligible for REGULAR (state) UI benefits per this decision, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.⁷

DECISION:

The March 22, 2023, (reference 01) UI decision is AFFIRMED. The employer discharged Mr. Clark from employment for a reason that does not disqualify him from receiving UI benefits. Benefits are allowed, as long as no other decision denies Mr. Clark UI benefits. Any benefits claimed and withheld on this basis shall be paid.



Daniel Zeno
Administrative Law Judge

April 25, 2023
Decision Dated and Mailed

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⁷ *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

APPEAL RIGHTS. If you disagree with this 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.