

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ABDUL MARAH
Claimant

WALMART INC
Employer

APPEAL NO. 20A-UI-00987-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/29/19
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 22, 2020, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on December 23, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on February 18, 2020. Claimant Abdul Marah participated and presented additional testimony through James Reynolds. Madison Bradshaw represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 3, 6 and 7 into evidence. The administrative law judge took official notice of the deputy's fact-finding notes for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview. The full fact-finding materials were not available to the Appeals Bureau at the time of the hearing.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Abdul Marah was employed by Walmart, Inc. as a full-time Asset Protection/Customer Host Associate at the Ankeny Walmart store from 2016 until December 23, 2019, when the employer discharged him from the employment. Mr. Marah's work hours were 7:00 a.m. to 4:00 p.m., Monday through Friday. Madison Bradshaw, Asset Protection Assistant Manager, was Mr. Marah's immediate supervisor. Mr. Marah's duties involved greeting customers they

entered the store and checking receipts as customers exited the store with unbagged items. Mr. Marah was posted near the entrance of the Walmart store.

The incident that triggered the discharge occurred on the morning of December 19, 2019, when Mr. Marah became upset about having to wait a short while to take his break. Mr. Marah could take a restroom break whenever needed, but was expected to take his regular break when business allowed, approximately two hours into his shift. The store management notified Mr. Marah that morning that regional managers were touring the store that morning. The store management advised Mr. Marah that he would need to wait a short while to take his break because the check-out lines were full, but that he would receive his break as soon as the number of customers in the check-out lines decreased. Mr. Marah erupted in a profanity-laced rant at the front of the store. Mr. Marah's belligerent display included him yelling that "no one ever listens, that managers "don't ever do anything," that he did not "fucking care anymore," that "this is fucking stupid," and similar profane remarks. When Ms. Bradshaw directed Mr. Marah to lower his voice, Mr. Marah continued his rant as soon as she turned to walk away. Mr. Marah yelled, "This is bullshit," "this is fucking ridiculous," and other similar utterance. Mr. Marah tantrum occurred in the presence of Walmart customers and staff. When Ms. Bradshaw directed Mr. Marah to go home for the day, Mr. Marah refused and continued his tantrum. Ms. Bradshaw then directed Mr. Marah to leave the store and threatened to summon law enforcement. As Mr. Marah turned to leave, he forcefully threw the three electronic devices he had in his possession to the ground. These included a hand-scanner, a portable printer, and a walkie-talkie. The printer shattered. The walkie-talkie landed near Ms. Bradshaw's feet, bounced and hit her. At that point, the Market Manager appeared and escorted Mr. Marah from the store. Though Mr. Marah asserts he wet himself due to a bladder control issue, he made no mention of this to the employer on December 19. The employer discharged Mr. Marah four days later. Mr. Marah's conduct violated multiple written work rules.

Mr. Marah established an original claim for benefits that effective December 29, 2019 and received \$2,100.00 in benefits for six weeks between January 12, 2020 and February 22, 2020. Walmart is the sole base period employer. On January 21, 2020, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Marah's separation from the employment. Mr. Marah participated in the fact-finding interview and intentionally misrepresented multiple material facts. Mr. Marah asserted that Ms. Bradshaw had told him multiple times to "shut-up," which did not occur. Mr. Marah told the deputy he "dropped" his equipment on the floor, when Mr. Marah had in fact thrown the equipment. When speaking with the deputy, Mr. Marah intentionally omitted any reference to his profanity laced rant and tantrum at the front of the Walmart store. The employer did not participate in the fact-finding interview.

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 of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418 (Iowa Ct. App. 1989).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995).

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 Ct. 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 evidence in the record establishes a discharge for misconduct in connection with the employment. The administrative law judge found much of Mr. Marah's testimony not credible. That included Mr. Marah's assertion that it was Ms. Bradshaw, not Mr. Marah who engaged in belligerent conduct at the front of the Walmart store. The weight of the evidence establishes that Mr. Marah went into full meltdown over having to wait a short time to take his regular break. The incident had nothing to do with a need for a restroom break. Mr. Marah engaged in highly disruptive behavior in full view and ear-shot of shoppers and staff. Mr. Marah's multiple vulgar rants were unacceptable and indefensible, especially given the environment in which they occurred. Mr. Marah engaged in violent behavior that included destruction of the employer's property and hitting his supervisor with an object. All of the conduct demonstrated a willful and wanton disregard of the employer's interests. Mr. Marah is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Marah must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Marah received \$2,100.00 in benefits for six weeks between January 12, 2020 and February 22, 2020, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Marah received constitute an overpayment of benefits. Though the employer did not participate in the fact-finding interview within the meaning of the law, Mr. Marah made multiple willful misrepresentations of material facts at the fact-finding interview. These include complete omission of his highly disruptive, profanity-laced tantrums. Mr. Marah is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The January 22, 2020, reference 01, decision is reversed. The claimant was discharged on December 23, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,100.00 in benefits for six weeks between January 12, 2020 and February 22, 2020. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn