

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

CHARLES W HESTER
Claimant

WALMART INC
Employer

APPEAL NO. 23A-UI-03061-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/26/23
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

On March 22, 2023, Charles Hester (claimant) filed a timely appeal from the March 15, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on February 18, 2023 for fighting on the job. After due notice was issued, a hearing was held on April 7, 2023. Claimant participated. Josh Howard represented the employer. Exhibit A, the online appeal, was received into evidence. Employer's proposed Exhibits 1 through 4 were not received into evidence because the employer did not serve the exhibits on the claimant prior to the hearing. The employer submitted the proposed exhibits to the Appeals Bureau by email on at 2:21 p.m. on April 6, 2023 and indicated in the submission that the employer had mailed the exhibits to the claimant. The employer representative did not know when the proposed exhibits were mailed to the claimant. A reasonable person would conclude they were mailed on April 6, 2023, the day before the hearing. The claimant had not received the exhibits.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Charles Hester (claimant) was employed by Walmart, Inc. as a full-time overnight stocker from 2014 until February 20, 2023, when the employer discharged him for violating the employer's policy against workplace violence. The claimant worked at the West Burlington store. The claimant's work hours were 10:00 p.m. to 7:00 a.m., Tuesday through Saturday. The claimant had received proper training regarding the workplace violence policy and most recently completed such training in August 2022.

The incident that triggered the discharge occurred at about 2:30 a.m. on February 20, 2023 in the employee breakroom while the claimant was on his unpaid lunch break. The claimant sat down at a table where a few coworkers were already seated. One of those coworkers, overnight stocker John Simmons, asked a question of another coworker. Though the question was not directed to the claimant, the claimant elected to respond. Mr. Simmons quipped, "I did not ask you," to which the claimant replied, "I don't care if you asked me. You asked a question and I gave an answer." When Mr. Simmons restated that he had not asked the claimant, the claimant said under her breath "goddamn children need to grow up and be more respectful." The claimant is 35 years old and estimates Mr. Simmons is in his early twenties. In response to the claimant's utterance, Mr. Simmons stated, "Why don't you do something about it?" The claimant stated, "Come talk to me when your balls drop." The claimant intended the utterance as an insult about Mr. Simmons youth.

At that point, Mr. Simmons grabbed the claimant's food. The claimant grabbed Mr. Simmons' hand. Mr. Simmons then pushed the claimant out of his chair and backed him into a wall. During the interaction, the claimant wiped food on Mr. Simmons' shirt. During the interaction, the claimant grabbed Mr. Simmons hand. One or more team leads were present and stepped in to break up the physical altercation. The employer sent both employees home. Later that day, Coach (supervisor) Marquis Johnson notified the claimant he was being discharged from the employment for violating the employer's policy against violence in the workplace. The employer discharged Mr. Simmons on the same day for the same reason.

Overnight Stock Coach (supervisor) Josh Howard was not present for the physical altercation between the claimant and Mr. Simmons, but reviewed video surveillance. The video surveillance reflected that the physical interaction was preceded by a verbal exchange. The video surveillance reflected that Mr. Simmons initiated the physical interaction. The video surveillance reflected that the Mr. Simmons and the claimant each pushed each other multiple times. In other words, the surveillance record reflected the claimant went beyond self-defensive measures and became an active participant in the altercation.

The claimant acknowledges that he could have walked away early in the exchange, but asserts that later, during the physical interaction, he could not walk away due to fear of being assaulted from behind if he walked away. The claimant had multiple opportunities to exit the altercation, but did not do so until one or more supervisors intervened.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

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 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. Misconduct by an individual includes but is not limited to all of the following:

...
(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...
(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

Discharge for misconduct.

(1) Definition.

a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

...
(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

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 Iowa Administrative Code rule 871-24.32(4).

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).

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).

The evidence in the record establishes a discharge for misconduct in connection with the employment. The physical altercation was immediately preceded by the claimant directing patently offensive and demeaning utterances at Mr. Simmons. Though Mr. Simmons initiated the altercation, the claimant was not a passive participant. Nor did the claimant limit his participation to self-defensive measures. The claimant had opportunities to retreat from physical altercation, but did not do so until one or more supervisors intervened. The claimant's fighting behavior was a knowing and intentional violation of the employer's reasonable and uniformly enforced policy against workplace. The claimant's harassing utterances and the claimant's fighting behavior each demonstrated an intentional and substantial disregard for the employer's interests in maintaining a safe and civil work environment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The March 15, 2023 (reference 01) decision is AFFIRMED. The claimant was discharged for misconduct in connection with the employment. The discharge date was February 20, 2023. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.



James E. Timberland
Administrative Law Judge

April 11, 2023
Decision Dated and Mailed

APPEAL RIGHTS. If you disagree with the 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>.

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 adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

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.