**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**ZACQUARY A BENSON**
Claimant

**WAL-MART STORES INC**
Employer

**APPEAL NO. 17A-UI-12808-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 11/19/17**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Zacquary Benson filed a timely appeal from the December 11, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Benson was discharged on November 22, 2017 for causing dissension among other employees. After due notice was issued, a hearing was held on January 3, 2018. Mr. Benson did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate in the hearing. Diana Ferguson represented the employer. Exhibits 1 through 6 were received into evidence. The administrative law judge took official notice of the Benefits Bureau deputy's notes concerning the December 8, 2017 fact-finding interview.

**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: Zacquary Benson was employed by Wal-Mart Stores, Inc. as a full-time Cap 2 Supervisor at store number 2004 in Dubuque from May 2016 until November 22, 2017, when the employer discharged him for an alleged workplace violence policy violation. Mr. Benson's duties involved supervising several Cap 2 Associates as they unloaded freight trucks and moved the freight from the back room to the sales floor. Mr. Benson's work hours were 2:00 p.m. to 11:00 p.m., Sunday through Thursday. Mr. Benson was an hourly employee, rather than a salaried member of management. Assistant Manager Diana Ferguson was Mr. Benson's immediate supervisor. Brenda McGowan was a Co-Manager at the Dubuque store.

The final incident that triggered the discharge occurred November 16, 2017. On that day, a verbal disagreement arose between Mr. Benson and a Cap 2 Associate in connection with the Cap 2 Associate challenging Mr. Benson's instruction on how to perform assigned work. During the disagreement, Mr. Benson directed the Cap 2 Associate to "move the retarded pallet." The Cap 2 Associate perceived the utterance as Mr. Benson calling the Cap 2 Associate "retarded."

The Cap 2 Associate pushed Mr. Benson. At that point another associate stepped between the two men. Mr. Benson did not engage in fighting behavior. Mr. Benson reported the incident to Co-Manager Brenda McGowan. Ms. McGowan reviewed video surveillance of the incident and sent the Cap 2 Associate home. Ms. McGowan intended to "coach" Mr. Benson on his failure to de-escalate the dispute pursuant to Wal-Mart protocol. However, because the employer had previously "coached" Mr. Benson three times, the employer's computer system and/or Human Resources Market Manager John Burns prompted the store management to discharge Mr. Benson from the employment pursuant to the employer's progressive discipline protocol. On November 22, 2017, Assistant Manager Diana Ferguson notified Mr. Benson of the discharge.

The employer witness has knowledge of only one of the prior coaching that factored in the discharge. That prior coaching was from March 2017. The incident that triggered the March 2017 coaching involved Mr. Benson telling an associate a story and using an unspecified racial slur in telling the story.

**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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

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 establishes legitimate employer concerns, but fails to establish misconduct in connection with the employment that would disqualify Mr. Benson for unemployment insurance benefits. At the appeal hearing, the employer witness conflated the final incident with the March

2017 concern to provide wholly unreliable testimony concerning the final incident that triggered the discharge. Ms. Ferguson's initial testimony concerning the final incident was completely at odds with the final incident Ms. McGowan described at the December 8, 2017 fact-finding interview. Ms. McGowan was present for the final incident. Ms. Ferguson was not present for the final incident. Only after the administrative law judge read to Ms. Ferguson the Benefits Bureau deputy's notes regarding Ms. McGowan's statement at the fact-finding interview did Ms. Ferguson gain some measure of clarity on what the actual final incident entailed. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish that Mr. Benson engaged in any fighting behavior in connection with the final incident that triggered the discharge. The employer witness referenced surveillance video that the employer still has but did that the employer elected not to present as evidence. The employer witness speculated on what Mr. Benson might have done next if the other associate had not stepped in between the Cap 2 Associate and Mr. Benson. The weight of the evidence in the record establishes an error in judgment on the part Benson when he referred to the pallet as "retarded." The employer has presented insufficient evidence to establish that Mr. Benson called the Cap 2 Associate "retarded." The evidence in the record establishes a single prior incident of conduct on the part of Mr. Benson that factored in the discharge decision. The evidence concerning that incident establishes only that Mr. Benson employed some unspecified racial slur in the telling of a story. The employer was unable to provide further detail or context regarding that prior incident and unable to provide any particulars regarding the two earlier coachings that allegedly factored in the discharge.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Benson was discharged for no disqualifying reason. Accordingly, Mr. Benson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The December 11, 2017, reference 01, decision is reversed. The claimant was discharged on November 22, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs