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

OMER E HERSHBERGER
Claimant

WALMART INC
Employer

APPEAL NO. 19A-UI-00730-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/23/18
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Omer Hershberger filed a timely appeal from the January 16, 2019, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Hershberger was discharged on December 26, 2018 for using profane language on the job. After due notice was issued, an appeal hearing started on February 8, 2019 and concluded on February 12, 2019. Ms. Hershberger participated. Julie Leichty represented the employer. Exhibits 1, 2, 3, 6 through 9, 11, 12, 13, 17 and A were received into evidence.

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: Omer Hershberger was employed by Walmart as a full-time receiving clerk from 2011 until December 26, 2018, when he was discharged for using profanity at work. On December 21, 2018, Mr. Hershberger uttered the following remark in the workplace: "I am not your fucking nigger or your damn slave." Mr. Hershberger uttered the comment loud enough for multiple co-workers to hear. One or more co-workers reported the utterance to the employer. Mr. Hershberger uttered the comment because he was unhappy about the freight a co-worker was routing to him. Mr. Hershberger had witnessed over an extended period that a co-worker engaged in favoritism when distributing freight so that a friend of that co-worker had a light load and others, including Mr. Hershberger, bore a heavier share of the work. Mr. Hershberger uttered the profane, offensive comment in response to the co-worker in response to the co-worker's statement that he needed Mr. Hershberger to attend to process some freight in a timely manner. The employer has a written policy that prohibits use of profanity in the workplace. The employer has multiple written policies that prohibit harassment and discrimination in the workplace. Mr. Hershberger had received extensive and ongoing training in the employer's policies and was well familiar with those policies.

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). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See *Myers v Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The evidence in the record establishes misconduct in connection with the employment. No matter how frustrated Mr. Hershberger felt regarding the favoritism demonstrated by the co-worker, that was no excuse for the profane, patently racist, patently offensive utterance. The utterance demonstrated a willful and wanton disregard for the employer's interests in maintaining a civil work environment. Mr. Hershberger is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Hershberger must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The January 16, 2019, reference 01, decision is affirmed. The claimant was discharged 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 ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/scn