

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TIMOTHY D SMITH**  
Claimant

**APPEAL NO. 09A-UI-17993-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 10/25/09**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(8) – Current Act Requirement

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the November 19, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 11, 2010. Claimant Timothy Smith participated. Matt Buss, Asset Protection Coordinator, represented the employer. Exhibits One and Two were received into evidence.

**ISSUES:**

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

Whether the discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Timothy Smith was employed by Wal-Mart Stores as a full-time stocker from July 2007 until October 28, 2009, when Assistant Manager Terence Johnson discharged him for alleged theft. The incident that triggered the discharge occurred on October 6, 2009 and came to the attention of Asset Protection Coordinator Matt Buss on October 7, 2009. On October 7, a customer notified Mr. Buss that the customer had accidentally left a \$20.00 bill in the cash dispenser of a self-checkout lane on October 6 when the customer made a purchase. On October 7, Mr. Buss reviewed video surveillance that showed Mr. Smith using the same self-checkout lane to make a purchase after the customer question. The surveillance record showed Mr. Smith pocketing the customer's \$20.00 bill.

The employer did not discuss the matter with Mr. Smith until October 28, 2009, when the employer interviewed Mr. Smith about the incident. Pursuant to the employer's policy, Mr. Buss first investigated whether Mr. Smith had engaged in any other form of misconduct on any other occasion. On October 19, Mr. Buss concluded his investigation without finding evidence of other misconduct. Mr. Buss then coordinated with his supervisor a time to interview Mr. Smith and settled on October 28.

During the October 28 interview, Mr. Smith initially denied knowledge of any alleged theft because he thought the employer was asking about some *recent* event. When the employer clarified that the incident in question was the incident from October 6, Mr. Smith admitted to receiving an extra \$20.00 bill that he knew was not his and that he knew probably belonged to a customer. Mr. Smith had not returned the extra money to the employer or notified the employer that he had received an extra \$20.00 bill. At the end of the interview, the employer notified Mr. Smith that he was discharged from the employment.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5-2-a provides:

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:

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.

871 IAC 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.

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).

The weight of the evidence in the record fails to establish a current act of misconduct. The incident that triggered the discharge came to the employer’s attention on October 7, 2009. At that time, the employer had no other information to suggest other misconduct that needed to be investigated. Nonetheless, the employer looked for additional misconduct, found none, and concluded that investigation on October 19. The employer delayed another nine days before speaking with Mr. Smith about the incident. The 21-day delay between the employer’s knowledge of the October 6 incident and notice to Mr. Smith that the incident placed his employment in jeopardy caused the October 6 conduct to no longer constitute a “current act” at the time the employer first discussed the matter with Mr. Smith. Because there was no current act, the administrative law judge must conclude that the discharge was for no disqualifying reason. See 871 IAC 24.32(8). Because the conduct that triggered the discharge did not involve a current act, the administrative law judge need not determine whether Mr. Smith’s actions constituted misconduct in connection with the employment. Mr. Smith is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Smith.

**DECISION:**

The Agency representative’s November 19, 2009, reference 01, decision is affirmed. The discharge was not based on a current act. The claimant was discharged 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

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