

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PILLERS, JON, M**  
Claimant

**APPEAL NO. 11A-UI-07640-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 05/01/11**  
**Claimant: Respondent (1)**

Iowa Code § 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 May 25, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 6, 2011. Claimant participated. Jerry Hill represented the employer and presented additional testimony through Travis Newcomb. Exhibits One through 13 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: Jon Pillers was employed by Wal-Mart as a full-time tire lube and express support manager until May 3, 2011, when the employer discharged him for allegedly performing unauthorized work on a customer's vehicle and for alleged unauthorized departure from the workplace. The incident that prompted the discharge occurred on March 8, 2011 and came to the employer's attention that same day. On March 8, an employee reported to the employer that Mr. Pillers had performed brake work on a friend's vehicle at the workplace and that Mr. Pillers had left the workplace to go get a part for the friend's vehicle. Mr. Pillers had in fact not performed brake work and had not performed work on a friend's vehicle. Instead, Mr. Pillers was trying to investigate and address a customer's complaint regarding work previously done to the customer's wheel. The employer collected statements on March 8 and March 9. The employer ranked its investigation into the matter as a low priority. The employer reviewed video surveillance and transaction records, but assigned partial responsibility for its investigation to persons without sufficient training and experience to independently investigate the matter. The employer looked for other indications of misconduct, but found none. The employer waited until May 3, 2011 to mention the matter to Mr. Pillers. In the intervening eight weeks, Mr. Pillers had continued to report to

work and performed his regular duties. On May 3, the employer interviewed Mr. Pillers and then discharged him from the employment.

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

Iowa Code § 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 § 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 evidence in the record fails to establish a current act. The employer's eight-week delay, from the employer's knowledge of the alleged March 8 incident to the employer's first mention of the matter to Mr. Pillers on May 3, was unreasonable. The employer indicated through testimony that it collected statements on the day of the incident or the next day. The employer indicated that the employer ranked its investigation into the matter as a low priority. The employer indicated that it assigned partial responsibility for its investigation to persons without sufficient training and experience to independently investigate the matter. The employer indicated that the chief investigator was away on business for one week, but this does not account for the other seven weeks of delay. The employer indicated that it combed through surveillance records and transaction records for other indications of wrongdoing, but found none.

Because the discharge was not based on a current act, the discharge cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits. Because there was no current act, the administrative law judge need not consider whether the March 8 incident involved misconduct in connection with the employment. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

**DECISION:**

The Agency representative's May 25, 2011, 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

jet/pjs