

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN D KREIGHBAUM**  
Claimant

**APPEAL NO. 07A-UI-08489-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 08/05/07 R: 04**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

John Kreighbaum filed a timely appeal from the September 5, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 19, 2007. Mr. Kreighbaum participated. Co-Manager Mike Heili represented the employer.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: John Kreighbaum was employed by Wal-Mart as a full-time Unloader from May 17, 2005 until June 24, 2007, when Co-Manager Mike Heili discharged him for horseplay. The final incident that prompted the discharge occurred on June 24 and came to Mr. Heili's attention when a female employee notified him that two employees, including Mr. Kreighbaum, were throwing items in a back room. Mr. Heili summoned Mr. Kreighbaum to a meeting and asked him if had been doing anything out of the ordinary or unsafe in the back room. Mr. Kreighbaum told Mr. Heili that he and others had been throwing cosmetic "poofs" or shower nets. Mr. Kreighbaum had not initiated the horse play, but had retaliated when a coworker, Matt, threw items at Mr. Kreighbaum. The employer had been concerned that the horseplay occurred in an area that contained merchandise stacked on pallets. Mr. Heili was concerned that the horseplay could result in an employee colliding with a pallet and suffering injury. Mr. Kreighbaum confirmed that he knew this was in violation of the employer's policy against horseplay. Mr. Heili proceeded to discharge Mr. Kreighbaum.

Though there were no prior incidents of horseplay, Mr. Heili considered two prior safety related incidents in making the decision to discharge Mr. Kreighbaum. On December 9, 2006, the employer had reprimanded Mr. Kreighbaum for waiting until Sunday to report an accident that occurred on a Friday. The employer does not have additional information regarding the incident that prompted that reprimand. Mr. Heili also considered an incident on February 11, 2007, where Mr. Kreighbaum pulled a pallet through the store that was stacked especially high. The

pallet made contact with a pipe holding piñatas and caused the pipe and piñatas to fall. Mr. Kreighbaum did not appreciate how high the pallet was stacked. Mr. Kreighbaum was in a hurry to move merchandise onto the sales floor during a heavy freight night. Mr. Kreighbaum did not stop to assist the customer.

Though Mr. Kreighbaum is a high school graduate, he appears to have some functional deficits. Mr. Kreighbaum indicates that his school experience involved participating in both the regular classroom and in a special education program. During the hearing, the administrative law judge frequently had to repeat or rephrase questions, or redirect Mr. Kreighbaum's attention back to the hearing.

## **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 evidence in the record establishes misconduct in connection with the June 24 incident, but does not establish substantial misconduct. The evidence indicates that Mr. Kreighbaum was involved in relatively minor horseplay that involved throwing items of minimal weight and substance. The risk of injury was minimal. The evidence indicates that Mr. Kreighbaum did not instigate the horseplay, that Mr. Kreighbaum may have diminished judgment compared to other adults, and that Mr. Kreighbaum may have been easily led into participating in the conduct. These factors do not excuse the conduct, but are factors to be considered in determining the level of misconduct. Though the decision to discharge Mr. Kreighbaum from the employment was within the discretion of the employer, the evidence does not establish substantial misconduct that would disqualify Mr. Kreighbaum for unemployment insurance benefits. The evidence in the record is insufficient to establish that Mr. Kreighbaum was careless, negligent or engaged in intentional misconduct in connection with the prior incidents referenced by the employer.

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

**DECISION:**

The Agency representative's September 5, 2007, reference 01, decision is reversed. 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

