

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BILLY L MASTBERGEN**  
Claimant

**APPEAL NO. 10A-UI-03231-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**Original Claim: 01/10/10  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 12, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 14, 2010. Claimant Billy Mastbergen participated. Jan Coon, Store Manager, represented the employer. Exhibits One, Three, Four, and Five 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: Billy Mastbergen was employed by Wal-Mart as a full-time donut maker until September 10, 2009, when Store Manager Jan Coon discharged him from the employment.

The final incident that triggered the discharge occurred on September 4, 2009. On that date, Mr. Coon observed Mr. Mastbergen as he worked and saw Mr. Mastbergen performing his duties without the required latex gloves. Mr. Mastbergen did not don the gloves because he was in a hurry, but putting on the gloves would have taken minimal time. Mr. Mastbergen had received proper food safety training and was aware that he needed to wear gloves when preparing food for customers' consumption to avoid contaminating the food.

The final incident that triggered the discharge followed an incident on August 27, 2009. On that day, Mr. Mastbergen relabeled day-old donuts so that they would appear to be freshly made and so that they could remain on the shelf another day. The employer's donut-making protocol required that Mr. Mastbergen discharge the donuts and make new ones. By relabeling the donuts, Mr. Mastbergen avoided having to make new donuts and avoided having to document the discarding of the donuts. Mr. Mastbergen thought he was helping the employer's bottom line by relabeling the donuts.

## 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 establishes that Mr. Mastbergen was negligent in failing to put on latex gloves on September 4. The weight of the evidence fails to establish that Mr. Mastbergen licked his fingers while handling the donuts. The administrative law judge notes that the exit interview document, prepared within a week of the incident, references the gloves issue, but makes no mention of the finger-licking. The administrative law judge concludes that the employer's assertion, months after the event, that such conduct occurred cannot be deemed reliable. A reasonable person in the employer's position would have documented such conduct at the time it occurred, if it had in fact occurred. The weight of the evidence indicates that Mr. Mastbergen was negligent on August 27, 2009, when he relabeled the day-old donuts.

While the employer has presented sufficient evidence to explain its reasoning in discharging Mr. Mastbergen from the donut-making position, the administrative law judge must conclude that the evidence does not establish willful and wanton violation of the employer's interests or negligence or carelessness so recurrent as to indicate willful and wanton disregard of the employer's interests. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Mastbergen was discharged for no disqualifying reason. Accordingly, Mr. Mastbergen is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Mastbergen.

**DECISION:**

The Agency representative's February 12, 2010, reference 01, decision is affirmed. 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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