

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHERYL L ZIMMERMAN**  
Claimant

**APPEAL NO. 10A-UI-12473-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 07/11/10**  
**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 August 23, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 27, 2010. Claimant participated. Assistant Manager Eric Watson represented the employer.

**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: Cheryl Zimmerman was employed by the Wal-Mart Store in Atlantic as a full-time Support Manager until July 9, 2010, when Store Manager Tracy Ryan discharged her for a hazardous waste incident that occurred at the end of May or beginning of June 2010. Back at the end of May or beginning of June, a new Associate spoke to Ms. Zimmerman about a can of wood stain that needed to be cleaned up before it could go out on the sales floor. This was the limit of the conversation. At some point during the shift, the new Associate placed a can of wood stain in the trash compactor. The Associate had not sought authorization from Ms. Zimmerman to put the wood stain container in the compactor and Ms. Zimmerman had not provided authorization to put the wood stain in compactor. Ms. Zimmerman did not know until the next day that the new Associate had improperly disposed of the wood stain container in the compactor. Ms. Zimmerman may have unlocked the compactor for another Associate, but did not unlock the compactor so that the new Associate could dispose of the hazardous waste wood stain. The employer had a separate protocol for dealing with hazardous waste materials.

The next day another Associate was checking to see that the material had been properly disposed of and did not locate the wood stain in the designated hazardous waste area. That Associate brought the matter to the attention of Store Manager Tracy Ryan. Ms. Ryan spoke to Ms. Zimmerman regarding her knowledge of the incident and Ms. Zimmerman provided information consistent with that referenced above. Ms. Ryan said nothing to Ms. Zimmerman at

the time about this incident potentially leading to Ms. Zimmerman's discharge from the employment.

On June 29, 2010, the employer asked Ms. Zimmerman to write a statement regarding the incident that had occurred a month earlier. Ms. Zimmerman complied. The employer still said nothing to Ms. Zimmerman about this incident potentially leading to Ms. Zimmerman's discharge from the employment.

On July 9, 2010, Assistant Manager Eric Watson summoned Ms. Zimmerman to a meeting. Mr. Watson told Ms. Zimmerman that she was being discharged for allegedly opening the compactor for the Associate and for allegedly failing to discern what was being disposed of. The July 9 discharge was based solely on the incident that had occurred at the end of May or beginning of June. The meeting on July 9 was the first time Ms. Zimmerman received notice that her involvement in the matter might lead to her discharge 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 evidence in the record fails to establish a discharge based on a "current act." The evidence indicates that the incident that triggered the discharge came to the employer's attention at the end of May or beginning of June, the day after it occurred, but that the employer waited more than a month to notify Ms. Zimmerman on July 9 that the matter could lead to her being discharged from the employment. This was unreasonable delay. Because there was no current act, the discharge would not disqualify Ms. Zimmerman for unemployment insurance benefits. See 871 IAC 24.32(8).

The evidence also fails to establish misconduct on the part of Ms. Zimmerman. The evidence indicates that Ms. Zimmerman was wholly unaware of the unauthorized disposal of the hazardous material and had not in any way authorized or knowingly facilitated the inappropriate handling of the material.

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

**DECISION:**

The Agency representative's August 23, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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