

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRIAN J GUTIERREZ**  
Claimant

**APPEAL NO. 07A-UI-07576-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 07/08/07 R: 03  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Brian Gutierrez filed a timely appeal from the August 2, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 21, 2007. At the scheduled start of the hearing, the employer indicated it was waiving its right to participate in the hearing. Exhibits A and B 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: Brian Gutierrez was employed by Wal-Mart Stores as a full-time stock person from March 2005 until March 11, 2007, when Assistant Manager Jay Bickford discharged him from the employment. Mr. Bickford advised Mr. Gutierrez that he was being discharged from the employment because he had failed to disclose a prior domestic abuse assault conviction and/or a felony conviction on his job application. Mr. Gutierrez had completed the job application in 2005. The employer had known about the prior conviction no later than Christmas 2006. The employer waited until March 11, 2007 to notify Mr. Gutierrez that the failure to disclose the criminal conviction on the job application subjected him to possible 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 employer waived its right to participate in the hearing. The employer presented no evidence at the hearing to support the allegation that Mr. Gutierrez was discharged for misconduct and misconduct cannot be established.

Because the employer waived its right to participate in the hearing, the evidence in the record is limited to the evidence presented or submitted by Mr. Gutierrez. Part of that evidence is a signed statement from Mr. Bickford, which statement indicates Mr. Bickford knew about the prior

conviction as of December 2006. The evidence in the record fails to establish a "current act." See 871 IAC 24.32(8). Because the evidence fails to establish a "current act," the administrative law judge need not consider whether the conduct in question was misconduct.

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

**DECISION:**

The Agency representative's August 2, 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/kjw