

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASMIN E DOWNING**  
Claimant

**APPEAL NO. 08A-UI-04964-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 04/20/08 R: 03**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Wal-Mart Stores filed a timely appeal from the May 13, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 9, 2008. Claimant Jasmin Downing participated. Assistant Manager Josh Ovsak represented the employer and presented additional testimony through Assistant Manager Jamie Cumberworth. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Four 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: Jasmin Downing was employed by Wal-Mart as a full-time cashier from August 31, 2006 until April 19, 2008, when Assistant Manager Josh Ovsak discharged her. The decision to discharge Ms. Downing was based on a customer complaint on April 17 or 18. A female customer contacted the Wal-Mart store and spoke with Assistant Manager Jamie Cumberworth. The customer indicated that Ms. Downing had engaged the customer in conversation at the cash register. The customer has twin children with her. The customer alleged to Ms. Cumberworth that Ms. Downing had referenced that she had a friend who became pregnant with twins as a result of a rape. The customer further complained that she overheard Ms. Downing speaking to another customer about whether he was going out with his girlfriend that night. Ms. Downing had in fact engaged the female customer in a conversation about the customer's twins and had asked the customer whether the twins were "natural." When the customer inquired what Ms. Downing meant by "natural," Ms. Downing had referred to a recent Discovery Channel television show she had watched, which had dealt with mothers undergoing elective procedures in order to produce twins. Ms. Downing had not in fact referred to a person being impregnated with twins by means of a rape. Ms. Downing had in fact engaged a male customer in conversation. The male customer had come through Ms. Downing's line with oil and auto parts. Ms. Downing inferred that the customer would be spending the evening working on his car. The customer's girlfriend was with him and engaged in the conversation. The employer relied upon the version of events reported by the customer and discharged Ms. Downing from the

employment. At the time the employer discharged Ms. Downing, the employer notified her that she would be eligible for re-hire.

The employer expects cashiers to engage customers at the cash register to make customers feel welcome and appreciated. The employer does not expressly permit or prohibit particular topics of conversation. The employer does expect employees to treat customers and others with appropriate respect.

Ms. Downing had received a prior reprimand on May 19, 2007, when the store manager overheard her telling another employee that the employer's attendance policy did not make sense. Ms. Downing had also received a reprimand on June 29, 2007, for neglect of her duties and horseplay.

### **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 indicates that Ms. Downing made a good faith error in judgment when she engaged the customer in a conversation about the conception of the customer’s twins. The evidence does not support the assertion that Ms. Downing referred to a friend being impregnated by twins by means of a rape. The evidence indicates that although Ms. Downing chose to speak with the customer about a rather personal topic, Ms. Downing did not do so with the intention to alarm or offend the customer. Nor did Ms. Downing knowingly violate the employer’s policy concerning treating customers with respect. The evidence indicates that Ms. Downing did nothing inappropriate when she talked to a male customer in a light-hearted way about his plans for the evening.

The evidence in the record fails to establish misconduct in connection with Ms. Downing’s May 19, 2007 break room conversation with a coworker about their mutual belief that the employer’s attendance policy did not make sense.

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

**DECISION:**

The Agency representative’s May 13, 2008, 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

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