

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**MARTHA M MORSE
106 HAYES
BURLINGTON IA 52601**

**WAL-MART STORES INC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-05696-JTT
OC: 05/01/05 R: 04
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the May 17, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 16, 2005. Martha Morse (claimant) did not respond to the notice of the hearing and did not participate. Wal-Mart participated through John Hemsworth, Loss Prevention Manager. Exhibits One through Three were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Martha Morse was employed by Wal-Mart as a full-time “break pack” hourly associate from September 29, 1999, until May 2, 2005, when Loss Prevention Manager John Hemsworth and Personnel Manager Diane Barton discharged her for misconduct.

Ms. Morse worked at Wal-Mart's distribution center in Mount Pleasant, Iowa. As a "break pack" hourly associate, Ms. Morse was responsible for putting small items and/or small quantity items in boxes to be shipped to Wal-Mart's stores. The items in the break packs might be lipstick or other cosmetics. The break packs were utilized in circumstances where a store did not require an entire case of an item.

The distribution center has a notice posted at the entrance/exit utilized by associates and outside contractors that all packages, purses, briefcases, and containers are subject to inspection upon leaving the facility. Ms. Morse had worked at the distribution center for approximately five years. During Ms. Morse's employment at Wal-Mart, the distribution center had expended the search policy to packages, purses, briefcases and containers coming into the facility. Ms. Morse was aware of the policy and was also aware that employees had previously been discharged for refusing to submit to a search of their personal property.

On April 28, 2005, a loss prevention officer requested to look in Ms. Morse's purse as she was leaving the distribution center at the end of her shift. Ms. Morse refused the request to search her purse and exited the store. The employer had not suspected Ms. Morse of theft. There were two loss prevention officers present during the contact with Ms. Morse.

On April 29, the loss prevention officers brought the incident to the attention of Mr. Hemsworth. The loss prevention officer who requested the search advised Mr. Hemsworth that he had been prompted to request the search because Ms. Morse's purse seemed full. Mr. Hemsworth collected written and verbal statements from the loss prevention officers. The employer did not present the testimony of the loss prevention officers and did not submit the written statements of the loss prevention officers at the hearing.

On May 2, Mr. Hemsworth met with Ms. Morse. Ms. Morse indicated that the loss prevention officers had been laughing at the time they requested to look in her purse and that she believed they were joking. Ms. Morse indicated that she had never been subjected to a search of her purse in the five years she had worked at the distribution center. Ms. Morse provided a written statement. See Exhibit One.

The decision to discharge Ms. Morse was made by Joe Mercer, Regional Personnel Manager. On May 2, Ms. Barton and Mr. Hemsworth advised Ms. Morse that she was discharged from the employment based on the refusal to submit to a search of her purse. Ms. Morse had received no prior reprimands during the course of her employment and the employer had never suspected Ms. Morse of theft.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Morse was discharged for misconduct in connection with her employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8). 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 be fairly inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dep't. of Public Safety, 240 N.W. 2d 682 (Iowa 1976).

The evidence in the record fails to establish that Ms. Morse was discharged for misconduct. In Ms. Morse's written statement, she asserts the incident was a misunderstanding and provides additional information that supports that assertion. The employer presented neither the testimony of the loss prevention officers nor the written statements of the loss prevention officers. The evidence in the record may have provided sufficient basis for Wal-Mart to discharge Ms. Morse from the employment. However, based on the evidence in the record and the applicable law cited above, the administrative law judge concludes that the employer has

failed to sufficiently corroborate the allegation of misconduct. Ms. Morse was discharged for no disqualifying reason. Ms. Morse is eligible for benefits, provided she meets all other eligibility requirements.

DECISION:

The Agency representative's decision dated May 17, 2005, reference 01, is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/kjw