

**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**

**AUBREY GERST
911 FRANKLIN ST
BURLINGTON IA 52601**

**FARM KING SUPPLY INC
730 N BOWER
MACOMB IL 61455**

**Appeal Number: 04A-UI-08401-ET
OC: 07-04-04 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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 26, 2004, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 25, 2004. The claimant participated in the hearing. Andrea Gooding, Controller, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time sales clerk for Farm King Supply from October 6, 2003 to

June 22, 2004. On March 14, 2003, the claimant and co-worker Sarah Ford spat in another employee's salsa that she had brought from home and which had been sitting in the refrigerator for approximately three months. The claimant testified she and Ms. Ford planned to throw the salsa away before the third party ate it for lunch but they were called away to their job and left without doing so. The manager became aware of the situation and both the claimant and Ms. Ford received written warnings March 15, 2004, and were told that any further incidents would result in termination. They were also required to apologize to the third party and she accepted their apologies. The claimant believed that was the end of the disciplinary action regarding that situation and there were no further incidents until the corporate office became aware of the March 15, 2004, warning on June 22, 2004, and terminated her employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

871 IAC 24.32(1)a, (8) provide:

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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v.

Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant's actions in spitting in another employee's food were reprehensible and indefensible and if the employer had terminated her employment at that time, rather than waiting over three months, her request for unemployment insurance benefits would likely have been denied. The manager that issued the warning to the claimant was acting as an agent of the corporation and the fact that the manager did not forward the warning to the corporate office in a timely manner is an issue between the manager and the corporate office. Consequently, while condemning the claimant's behavior, the administrative law judge must conclude that the employer has not met its burden of proving disqualifying job misconduct because the final incident for which the claimant was discharged was not a current act of misconduct. Therefore, benefits are allowed.

DECISION:

The July 26, 2004, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/kjf