

**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**

**Appeal Number: 06A-UI-05727-JTT
OC: 05/07/06 R: 01
Claimant: Appellant (2)**

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.

**MICHELLE M BOOS
2172 – 170TH ST
NEW HAMPTON IA 50659-9309**

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.

**D J FOOD & DRUG INC
LIDDLE'S SUPER VALU
PO BOX 488
NEW HAMPTON IA 50659-0488**

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Michelle Boos filed a timely appeal from the May 23, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 20, 2006. Claimant participated. At the time of the hearing, owner Jim Durbin indicated that the employer waived its right to participate in the hearing.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Boos was employed by the Super Valu in New Hampton from October 1995 until May 5, 2006. At the time she separated from the employment, Ms. Boos was the part-time general merchandising manager. Approximately five years ago, Jim and Donna Durbin purchased the store and Ms. Boos continued her employment under the new ownership. During the last few

months of Ms. Boos' employment, there was a breakdown in Ms. Boos' relationship with the owners. Ms. Boos discovered that the owners had interfered with Ms. Boos' product ordering duties and had made misrepresentations to Ms. Boos regarding matters that impacted on her ability to perform her assigned duties. Ms. Boos concluded that she was being mistreated. Ms. Boos concluded that the employer was mistreating other employees as well.

The discord in the employment relationship erupted on May 5. Ms. Boos was upset that the employer had scheduled the courtesy counter clerk to work until noon on the day the clerk was to bury her father at 1:00 p.m. Ms. Boos was also upset that the employer was adding to Ms. Boos' duties. The atmosphere at the store was indicative of an impending closure of the store and this was a source of anxiety for Ms. Boos. On May 5, Owner Donna Durbin raised her voice in talking to Ms. Boos about work matters and Ms. Boos followed suit. Ms. Durbin yelled at Ms. Boos that Ms. Boos was being disrespectful towards the employer. Ms. Boos yelled back that she was sick and tired of what had been transpiring at the store and wanted the employer to level with the employees about whether the store was about to close. The owners were in fact preparing to sell or close the store.

In response to Ms. Boos' raised voice response, Ms. Durbin directed Ms. Boos to the office and summoned Mr. Durbin. Ms. Boos asked that an additional witness be present in light of the employer's assertion that she was being disrespectful, but the owners rejected the request. During the meeting, Ms. Durbin conveyed to her husband that Ms. Boos was being disrespectful. Ms. Boos reminded the employer that Mr. Durbin had repeatedly lied to Ms. Boos about a merchandise order Ms. Boos had placed in March. With regard to that order, Mr. Durbin had led Ms. Boos to believe, through repeated misrepresentations, that the order had not arrived because items had been discontinued. When Ms. Boos continued to press for information on the order, Mr. Durbin raised his voice at the time he told Ms. Boos he had in fact cancelled the order. During the meeting on May 5, Ms. Boos also reviewed one or more similar incidents wherein Mr. Durbin had made misrepresentations to Ms. Boos about an order. Ms. Boos told the owners that if she was being disrespectful, the owners had made her feel belittled and humiliated. At this point, Mr. Durbin said the employer did not have to take what Ms. Boos was saying. Ms. Durbin told Mr. Durbin to escort Ms. Boos out of the store. As Ms. Boos was leaving the store, she attempted to make a call on her cell phone. Ms. Durbin told Ms. Boos that while Ms. Boos was in the owners' store she would not make calls on her cell phone. Ms. Boos replied that since she was apparently no longer employed there, she would make calls. There was no further conversation. Ms. Boos departed the workplace.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether the evidence in the record establishes a quit or a discharge.

All terminations of employment are generally classifiable as layoffs, quits, discharges, or other separations. 871 IAC 24.1(113). A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination and failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the

employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

In evaluating beliefs formed or conclusions drawn by an employer or employee, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The evidence in the record indicates that Ms. Boos had not formed an intent to sever the employment relationship at the time she was directed to leave the store and was escorted out of the store. The circumstances surrounding Ms. Boos' departure from the store on May 5 would have caused a reasonable person to conclude that Ms. Boos had been discharged by the employer. The administrative law judge concludes that Ms. Boos did not quit, but was discharged from the employment.

The next question is whether the evidence in the record establishes that Ms. Boos was discharged for misconduct in connection with the employment. It does not.

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).

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).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer waived its right to participate and, thereby, has failed to present any evidence to support a discharge for misconduct. The evidence in the record indicates that Ms. Boos was reasonably upset about the employer's treatment of herself and other employees and reasonably anxious and insecure about her continued employment. Ms. Durbin escalated the disagreement by raising her voice. This was not the first time the Durbins had raised their voices in addressing Ms. Boos. Though Ms. Boos exercised poor judgment in raising her own voice, the concerns she raised were reasonable under the circumstances.

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

DECISION:

The Agency representative's decision dated May 23, 2006, reference 01, is reversed. 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.

jt/cs

