

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

FRANCES A WRIGHT

Claimant,

and

MOTHERS WORK INC

Employer.

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HEARING NUMBER: 10B-UI-04324

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Employment Appeal Board would comment that this was an isolated instance of poor judgment on the claimant's part. Additionally, we would find the final act was not a current act upon which to base the claimant's termination. The record clearly establishes that the final act occurred on May 15, 2009, which was the same day the employer became aware of the matter. (Tr. 4) However, the employer did not take further action until May 21st when she talked to the customer again. The employer admits that the claimant received no prior warnings. (Tr. 5) It wasn't until the employer's investigation ended on June 3rd that corporate directed the employer to terminate the claimant, which was 19 days after the incident.

871 IAC 24.32(8) provides:

Past acts of misconduct. While past acts and warning 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. (Emphasis added.)

Furthermore, the court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a “current act,” the date on which the conduct came to the employer’s attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. There is nothing in this record to show that the claimant was ever told, once the employer learned of the incident back in mid-May, that her job was in jeopardy pending the conclusion of any investigation. For this reason, we also hold that even if the final act was considered misconduct, it was not a current act within the meaning of the law.

John A. Peno

Monique F. Kuester

Elizabeth L. Seiser

AMG/fnv