

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHAWNA G BOGER**  
Claimant

**APPEAL NO. 09A-UI-00572-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BOSSELMAN INC OF IOWA  
BOSSELMAN TRAVEL CENTER**  
Employer

**OC: 12/07/08 R: 02  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Shawna Boger filed a timely appeal from the January 6, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 29, 2009. Ms. Boger participated. Randy Ateess, General Manager, represented the employer.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether claimant's discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Shawna Boger was employed at a full-time food server at Bosselman Travel Center from July 3, 2007 until November 25, 2008, when General Manager Randy Ateess suspended her. A human resources representative subsequently notified Ms. Boger on December 2, 2008 that she was discharged from the employment.

The final incident that prompted the discharge came to the attention on November 13, 2008, when a customer, John, complained to Mr. Ateess about an incident he alleged had occurred a couple days prior. The customer did not explain why he had not complained to the manager on duty at the time of the incident or why he waited a couple days to complain. The customer alleged that Ms. Boger had told him to shut up. Ms. Boger had in fact asked the regular customer and his companions to keep their volume down to a "low roar" so as not to disturb other patrons. Neither Mr. Ateess nor anyone else spoke to Ms. Boger about John's complaint until November 25, 2008. On that day, Ms. Boger found she was not able to clock in on the employer's computer system. Ms. Boger went to find out why. At that time, Mr. Ateess told Ms. Boger that she was suspended because a customer had complained that Ms. Boger told the customer to shut up. Mr. Ateess told Ms. Boger to contact him the following Monday to discuss whether she would be allowed to return to work. On the following Monday,

December 1, 2008, Ms. Boger contacted Mr. Ateess. Mr. Ateess indicated that he had not yet fully investigated the matter and would get back to her. Mr. Ateess did not receive any additional information from John the customer after receiving the initial report on November 13. On December 2, 2008, Ms. Boger received a call from a human resources representative, who told Ms. Boger she was discharged from the employment.

## **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 establishes that Ms. Boger was suspended and discharged for actions that did not constitute a "current act" of misconduct. See 871 IAC 24.32(8). The weight of the evidence indicates that the incident that prompted the discharge came to the attention of the General Manager on November 13, 2008, but that the employer did not discuss the incident with Ms. Boger until 12 days later, on November 25, when the employer suspended Ms. Boger. Because the discharge was not prompted by a "current act," the discharge would not disqualify Ms. Boger for unemployment insurance benefits. See 871 IAC 24.32(8). Even if the complaint from John the customer had involved a "current act," the evidence in the record fails to establish that the incident occurred as the customer alleged. In other words, the employer had presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove misconduct in connection with the incident that prompted the discharge. Because the incident that prompted the discharge was not a current act, the administrative law judge need not consider other allegations of misconduct.

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

**DECISION:**

The Agency representative's January 6, 2009, reference 01, decision 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.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/kjw