

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JESSICA S BARBER**  
Claimant

**APPEAL NO. 06A-UI-09788-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KUM & GO LC**  
**KUM & GO**  
Employer

**OC: 08/27/06 R: 02**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Kum & Go filed a timely appeal from the September 20, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 30, 2006. Claimant Jessica Barber participated. General Manager Scott Woodman represented the employer. Employer's Exhibits One and Two were received into evidence. The administrative law judge took official notice of Agency records regarding benefits disbursed to the claimant.

**ISSUE:**

Whether Ms. Barber was discharged for a current act of misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. She was not.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Barber was employed by Kum & Go on a full-time basis from November 28, 2005 until September 27, 2006, when General Manager Scott Woodman discharged her. At the time Ms. Barber separated from the employment, she held the title of Sales Manager. Mr. Woodman was Ms. Barber's immediate supervisor.

The final incident that prompted the discharge occurred on or about July 19, 2006. Ms. Barber had just returned from a vacation and was working her first shift back. Ms. Barber did not complete all of her assigned duties for her shift and indicated coming on at the end of her shift that she had not felt like working. Mr. Woodman issued a reprimand to Ms. Barber and advised that he expected her to be the second hardest working person at the convenience store and to set an example for other employees. At the same time, Mr. Woodman warned Ms. Barber that he expected her and other employees to promptly alert him when a competitor's gas prices changed. Within a week or two of this warning, Ms. Barber forgot to so notify Mr. Woodman of a gas price change. Mr. Woodman ultimately discharged Ms. Barber on September 27, 2006 because he did not believe she was performing to the employer's expectations.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Barber 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). 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).

The evidence in the record fails to establish a “current act” of misconduct that might serve as a basis for disqualifying Ms. Barber for benefits. The evidence indicates that final incident that prompted the discharge occurred on July 19. Even if the administrative law judge considers the subsequent failure to alert Mr. Woodman regarding gas price changes at the competitor, the evidence indicates final incidents that occurred no later than the first week of August. A discharge for misconduct must be based on a “current act” and such is lacking here. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Barber was discharged for no disqualifying reason. Accordingly, Ms. Barber is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Barber.

**DECISION:**

The Agency representative’s September 20, 2006, reference 01, decision is affirmed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/cs