

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

NICHOLAS R IRLBECK

Claimant,

and

FAREWAY STORES INC

Employer.

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HEARING NUMBER: 14B-UI-13969

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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: 96.5-2-A, 24.32-8

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Cloyd (Robby) Robinson would affirm and Monique F. Kuester would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law.

486 IAC 3.3(3) provides:

Appeal board decisions. A quorum of two members of the appeal board must be present when any decision is made by the appeal board. Should there be only two members present and those two members cannot agree upon the decision, the case shall be issued as a split decision and the decision of the administrative law judge shall be affirmed by operation of law.

Monique F. Kuester

Cloyd (Robby) Robinson

AMG/ss

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. I find that the administrative law judge erred in concluding that the Claimant was eligible for benefits solely on the current act issue. The fact that the Employer has a policy regarding off-duty conduct significantly influenced my decision. The Claimant had knowledge of this policy based on his signature, which he gave in acknowledgement of receipt of the Employee Handbook containing said policy. I would find that his combative and belligerent behavior was a knowing and intentional violation of that policy. His behavior was egregious and he didn't act in self-defense. In fact, when he had an opportunity to retreat, he failed to do so, which further exacerbated a situation that he, admittedly, initiated. Based on this record, I would conclude that the Employer satisfied their burden of proof.

I would also point out that under Iowa Code §96.5(2)(b) "if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers." The cancellation of wage credits means that, even if the Claimant earns ten times his benefit amount following his discharge from this Employer, he may never collect benefits chargeable to the Employer. The parties should be aware that a determination of gross misconduct "may be re-determined within five years from the effective date of the claim." Iowa Code §96.5(2)(c). Thus the issue of gross misconduct might be determined in the future.

Gross misconduct, meanwhile, is "deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act." Iowa Code §96.5(2)(c). In Iowa, indictable offenses include serious misdemeanors, aggravated misdemeanors, and felonies, all of which are punishable by a fine of more than \$500 and more than 30 days in jail. If the Claimant is eventually convicted of an indictable offense the Employer may seek retroactive relief under these provisions.

Monique F. Kuester

AMG/ss