

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**CHERI K FOREMAN**  
Claimant

**APPEAL NO. 19A-UI-01460-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KUM & GO LC**  
Employer

**OC: 01/20/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Cheri Foreman filed a timely appeal from the February 11, 2019, reference 01, decision that held she was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 21, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on March 12, 2019. Ms. Foreman participated personally and was represented by attorney Erik Bair. The employer did not register a telephone number for the appeal hearing and did not participate in the appeal hearing. On March 6, 2019, the employer provided written notice that the employer waived participation in the appeal hearing. At the time of the appeal hearing, Mr. Bair informed the administrative law judge that the employer had not responded to the Request for Production and Interrogatories that Mr. Bair mailed to the employer on February 19, 2019.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Cheri Foreman was employed by Kum & Go, L.C. as a full-time General Manager until September 21, 2018, when Dan Childs, District Supervisor, discharged her from the employment. Mr. Childs was Ms. Foreman's immediate supervisor. Ms. Foreman began the employment in 2013. Ms. Foreman served at General Manager at the Kum & Go store located on Keosauqua Way in Des Moines during the final two and a half years of her employment.

At the time of the discharge, Mr. Childs cited performance issues and an incident on September 17, 2018 as the bases for the discharge. On September 17, a store clerk summoned Ms. Foreman to check the ID of a male customer attempting to purchase beer. The customer refused to produce the ID. The customer became belligerent and violent. Ms. Foreman was in fear and pushed a panic button. The customer threw a can of beer at Ms. Foreman. The customer smacked a cigarette lighter rack that then hit Ms. Foreman in the

face. The customer attempted to climb over the counter to attack Ms. Foreman and Ms. Foreman pushed some merchandise to the customer to prevent him from coming over the counter. Ms. Foreman did not throw anything at the customer. When the customer exited the store, two of Ms. Foreman's subordinates went outside to try to get the customer's license plate number or other identifying information. Ms. Foreman went to the door to get the employees to reenter the store. Though the employer had not provided Ms. Foreman with a policy, work rule, or training regarding how to handle such situations, Mr. Childs faulted Ms. Foreman's handling of the matter. Ms. Foreman had received no prior reprimands.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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).

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).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995).

The evidence in the record establishes a discharge for no disqualifying reason. The employer waived participation in the appeal hearing and presented no evidence to meet its burden of proving misconduct in connection with the employment. The evidence in the record does not establish misconduct in connection with the employment. With regard to the final incident that triggered the discharge, the evidence establishes that Ms. Foreman responded reasonably and in self-defense when attacked by the customer. Ms. Foreman is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

**DECISION:**

The February 11, 2019, reference 01, decision is reversed. The claimant was discharged on September 21, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. 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/rvs