

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**COURTNEY R KRIEG**  
Claimant

**APPEAL NO. 13A-UI-13258-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**P B SUBS INC**  
Employer

**OC: 11/03/13**  
**Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(8) – Current Act Requirement

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the November 26, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 19, 2013. Claimant Courtney Krieg participated. Kelly Kunnert, owner and General Manager, represented the employer and presented additional testimony through Brandie Lenz. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

**ISSUES**

Whether Ms. Krieg separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether the employer's account may be charged for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Kelly and Tom Kunnert, wife and husband, own and operates multiple Pickle Barrell Subs deli restaurants in Dubuque. Ms. Kunnert is General Manager. Claimant Courtney Krieg commenced working for the employer in 2012 and last performed work for the employer on or about October 4, 2013. Throughout the employment, Ms. Krieg worked at the employer's Key West location in Dubuque, where she was generally scheduled to work 10 to 15 hours per week. Up until September 7, 2013, Ms. Krieg had also filled in as needed for several months at the employer's Delhi Street location. Ms. Krieg's immediate supervisor at the Key West location, during the last several months of the employment, was Ashley Davidson, Store Manager. Ms. Krieg's immediate supervisor when she worked at the Delhi Street location was Brandi Lenz, Store Manager.

On or about October 7, 2013, Ms. Davidson notified Ms. Krieg that Ms. Davidson had been directed by Kelly Kunnert to remove Ms. Krieg from the work schedule. Ms. Davidson cited a newspaper article regarding Ms. Krieg's October 4, 2013 arrest on a robbery charge as the basis for the decision to remove her from the schedule. Ms. Krieg had indeed been arrested on

October 4, 2013 and charged with Robbery in the Second Degree, a class C felony. The alleged criminal offense was not related to the employment.

The employer cites additional concerns with the employment including attendance and cash drawer shortages. The cash drawer shortages occurred in August 2013 and came to the employer's attention at the time they occurred. The most recent absence for which the employer has information occurred on August 16, 2013.

#### **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 employer did not present testimony from Ms. Davidson or Tom Kunnert.

The evidence in the record establishes that Ms. Krieg was discharged from the employment on or about October 7, 2013 for no disqualifying reason. The incident that had occurred close in time to the discharge, and that appears to have triggered the discharge, was a non-work-related criminal offense. While the alleged criminal offense might well have involved misconduct, it did not involve misconduct *in connection with the employment*. The other matters the employer cites as concerns in the employment occurred in August 2013 and came to the employer's attention at that time. Those earlier concerns were not "current acts" within the meaning of the unemployment insurance law at the time of discharge and, therefore, cannot serve as a basis for disqualifying Ms. Krieg for benefits absent a more recent, "current act," of misconduct.

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

**DECISION:**

The Agency representative's November 26, 2013, 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/pjs