IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RICHARD F SWIGER
Claimant

GIT-N-GO CONVENIENCE STORES INC
Employer

APPEAL NO. 11A-UI-12582-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 0828/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Git-N-Go Convenience Stores (employer) appealed a representative's September 22, 2011 decision (reference 01) that concluded Richard Swiger (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 17, 2011. The claimant participated personally. The employer participated by John Judge, supervisor. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on November 10, 2009, as a full-time store manager. The claimant signed for receipt of the employer's handbook on November 10, 2009. The employer did not issue the claimant any warnings during the hearing.

On August 29, 2011, the claimant heard the assistant manager say that the employer was planning to terminate the claimant. The claimant knew that this was how the company had started separations with other employees. On August 30, 2011, the claimant called the employer and asked for a meeting. The employer told the claimant that it would try to schedule the meeting for later that day. The supervisor called the claimant and said that the employer was not planning on ending the claimant's employment relationship. The claimant asked the employer to move the assistant manager away for spreading rumors or to move the claimant to another store out of the hostile work environment. The meeting was planned for 3:00 p.m. on August 31, 2011. The claimant was upset and felt ill. He properly reported his absence and told his replacement worker that the employer should not call him at home.

On August 31, 2011, the claimant reported for work. A vendor told the claimant that the south side store told him that the claimant was being terminated. The claimant called the supervisor and said that there was no need to work until the 3:00 p.m. meeting if the employer had already

replaced him. The claimant stated that the employer needed to provide a worker to cover his shift so he could leave the workplace. The employer sent a worker to replace the claimant and the claimant went to the corporate office.

When he arrived, the office manager told the claimant to wait for the employer to return to the office. The claimant was agitated, went to the bathroom, and then paced in the parking lot. The claimant did say "bitch" under his breath. The employer thought the claimant looked aggressive because he had removed his uniform shirt and was wearing his undershirt. The employer called the police. The police investigated and did not cite the claimant. The employer terminated the claimant for insubordinate behavior on August 30 and 31, 2011.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). In this case, the claimant knew the employer's history of

methods of termination and thought he was being terminated for no reason. Clearly, the claimant was upset that he might be terminated. Instead of meeting with claimant immediately, the supervisor waited for the director of marketing and allowed the claimant to become more upset. The claimant knew he was upset and went outside to walk off his tension. The employer terminated the claimant for his behavior or August 30 and 31, 2011. The behavior was witnessed by people who did not testify at the hearing.

The employer did provide the statement of the director of marketing, who indicates that the claimant was terminated for refusal to work at the location where the assistant had spread rumors. The employer did not address the claimant's assertion of a hostile work environment. The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible, because he was an eyewitnesses to the events for which he was terminated. The employer provided one written statement to support its case.

DECISION:

The representative's September 22, 2011 decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/kjw