IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARLA K MEAD
2770 NE 51ST CT
DES MOINES IA 50317

GIT-N-GO CONVENIENCE STORES INC
2716 INDIANOLA AVE
DES MOINES IA 50315-2399

Appeal Number: 04A-UI-07327-RT
OC: 06/06/04 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Marla K. Mead, filed a timely appeal from an unemployment insurance decision dated June 28, 2004, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on August 3, 2004, with the claimant participating. Randy Ratcliff, Director of Marketing, participated in the hearing for the employer, Git-N-Go Convenience Stores, Inc. The hearing had originally been scheduled for July 28, 2004 at 9:00 a.m. and rescheduled at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, most

recently as a merchandiser beginning June 10, 1998, from June 28, 1995 until she was discharged on June 8, 2004. The claimant was discharged for allegedly violating the employer's professional conduct policy. The employer has a conduct policy governing the conduct of its employees in regards to others. Since the employer was having some problems with professional conduct, the employer had a meeting with employees on May 4, 2004. The claimant was present at the meeting and a memo was discussed and signed by all present, including the claimant, about the professional conduct policy. This conduct policy was in some manner discussed with the claimant privately as well.

The claimant's position as a merchandiser requires that she go out to stores and assist employees in their training and running the business. On June 2, 2004, the claimant and another were sent to the store in Madrid, Iowa. She was told that new employees were there and she was supposed to assist in their training and help them. When the claimant and the other merchandiser arrived, they found the store in a poor condition. The claimant spent most of the day cleaning the cooler and putting the items in the back room. The manager came in at some time during the day and talked to the other merchandiser accompanying the claimant and asked them to talk to the assistant manager. When the assistant manager came in, the assistant manager was upset about the items being stored in the backroom. The claimant indicated that she was cleaning the cooler and had set these items in the backroom but they would be thrown out. The claimant and the assistant manager had words. The claimant asked the other merchandiser to calm the assistant manager down and he tried to do so, but then he had words with the assistant manager as well. The claimant then had additional words with the assistant manager herself. Eventually, the claimant spoke to her supervisor, Laura, who apparently also had words with the claimant. The claimant talked to the other employees about the Madrid, Iowa location, about the condition of the store and did not yell at them, but her voice does occasionally sound loud without intending it to be so. The claimant had never received any written warnings for this behavior and whether the claimant had received any verbal warnings was uncertain. The claimant did get an oral warning regarding gossip, but this warning was given to everyone.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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 parties both testified that the claimant was discharged on June 8, 2004 and the administrative law judge makes that conclusion. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Randy Ratcliff, Director of Marketing, testified primarily from hearsay statements made by others. The claimant's direct testimony outweighs the hearsay evidence of Mr. Ratcliff. The claimant was discharged for an alleged confrontation on June 2, 2004, with the employees and the assistant manager at the employer's Madrid, Iowa, location which allegedly violated the employer's professional conduct policy. The claimant was aware of the employer's professional conduct policy having signed a memo in that regard at a meeting where the conduct policy was discussed on May 4, 2004. The claimant denies that she yelled at employees but concedes that she criticized or talked to the employees about the condition of the store because it was a mess. The claimant was sent out to help train and assist the employees there, and when she arrived, she found the store in a mess. The claimant spent most of her day cleaning the cooler out. Apparently, the claimant and the other merchandiser that accompanied the claimant had words with the assistant manager and this is what apparently eventually led to the claimant's discharge along with alleged complaints by the employees. Based upon the claimant's testimony and explanation of what occurred on June 2, 2004, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that claimant's behavior was a deliberate act or omission constituting a material breach of her duties and/or evinced a willful or wanton disregard of the employer's interests and/or was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the claimant's behavior appears to be ordinary negligence in an isolated instance or unsatisfactory conduct and is not disqualifying misconduct. The employer's witness, Randy Ratcliff, Director of Marketing, testified that there had been other incidents of similar alleged behavior by the claimant but had no dates or times and could only testify that he had had complaints from other managers and employees. This is insufficient evidence to base a conclusion of disqualifying misconduct.

Mr. Ratcliff did testify that the claimant had received no written warnings but claimed that the claimant had received several verbal warnings. The claimant testified that she did not remember receiving any verbal warnings except for a verbal warning concerning gossip, which everyone received. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant received any verbal warnings about this behavior. In any event, the administrative law judge notes that the claimant had been employed by the employer for nine years and had been a merchandiser for six years before she was discharged, and the administrative law judge believes that the claimant should have been entitled to receive a written warning specifying her behavior so that she would have an opportunity to specifically address that behavior and this did not occur here.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature, including the evidence thereof. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989).

The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision dated June 28, 2004, reference 02, is reversed. The claimant, Marla K. Mead, is entitled to receive unemployment insurance benefits provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

kjf/tjc