

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARCIE J SULLIVAN
Claimant

APPEAL NO. 12A-UI-09429-VST

OLYS CORNER INC
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/08/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated July 30, 2012, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 29, 2012. The claimant participated personally. The employer participated by Mark Olsen, owner, and Linda Pierson, manager. The record consists of the testimony of Mark Olsen; the testimony of Linda Pierson; and the testimony of Marcie Sullivan.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a gas and convenience store. The claimant worked for the previous owner. The current owner, Mark Olsen, purchased the business on July 12, 2010. The claimant continued to work for him as a full-time cashier. Her last day of work was July 9, 2012. She was terminated on July 10, 2012.

The incident that led to the claimant's termination occurred earlier in the week of the claimant's termination. A customer came into the store and asked the claimant to order some cigarettes for him. His particular brand was not in stock. The claimant told the customer she would have to leave a note for Linda Pierson because she now did the cigarette ordering. The claimant forgot to leave the note for Linda and when the claimant came in for his cigarettes, they were not in stock.

The employer also took into account a drive off for gas that took place on June 21, 2012. When the claimant called Mr. Olsen about it, there was a heated verbal exchange. The customer in question came in the next day and paid for the drive off. There was also a drive off on July 6, 2012, but Mr. Olsen knew this customer and knew he would pay. The employer also had complaints about the claimant. Most of the complaints were that the claimant was saying

negative things about the employer and the way business was being done. One was overheard by Mr. Olsen's wife in the grocery store and the claimant got a verbal warning on September 3, 2010.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

The final incident that led to the claimant's termination occurred sometime in the week preceding the termination. A customer had come in and requested a particular brand of cigarettes. The claimant did not order the cigarettes and said she would have to leave a note. She forgot to leave the note. The claimant's failure to leave the note is not misconduct. The legal definition of misconduct specifically excludes simple acts of negligence in isolated situations. The claimant testified she did not deliberately fail to leave the note. She simply forgot. This is a simple act of negligence and is not misconduct. Therefore the claimant was not discharged for a current act of misconduct. The "Brian Hoffman" drive off took place on June 21, 2012, and therefore is also not a current act of misconduct since it is too remote in time, even assuming it is an act of misconduct.

The most reasonable inference from the evidence is that the claimant was a disgruntled employee and the employer simply had had enough complaints about her. This may be a good business reason for terminating the claimant but is not sufficient grounds for disqualifying the claimant from receiving unemployment insurance benefits. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated July 30, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs