

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA L MAHONEY
Claimant

APPEAL NO. 11A-UI-09854-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**GAS-MART USA INC
EDDY'S**
Employer

OC: 05/29/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Brenda Mahoney (claimant) appealed a representative's July 20, 2011 decision (reference 02) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Eddy's (employer) for conduct not in the best interest of the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 18, 2011. The claimant participated personally. The employer participated by Greg Poth, manager.

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 March 18, 2011, as a part-time cashier. The employer has a handbook, but the claimant did not receive it. The employer talked to a number of employees about not using cellular telephones on work time and that corporate office could terminate. The employer regularly let employees go outside to smoke. While smoking, employees could use cellular telephones.

On May 21, 2011, the claimant was outside smoking a cigarette sitting on the curb by a handicapped parking stall. A car pulled in and almost hit the claimant. The claimant said, "What the hell," and made a comment to the person on the telephone about how the woman "damn near ran me over." The customer went inside and told the employer that the claimant said, "Why do fucking people have to pull up when I'm on my break?" The employer terminated the claimant on June 17, 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.

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.

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). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct that was near in time to the discharge. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's July 20, 2011 decision (reference 02) is reversed. 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