IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMARA E NELSEN
Claimant

GIT-N-GO CONVENIENCE STORES INC
Employer

APPEAL NO: 11A-UI-02233-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/02/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Git-N-Go Convenience Stores, Inc. (employer) appealed a representative's February 18, 2011 decision (reference 01) that concluded Tamara E. Nelsen (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on May 20, 2011. The claimant participated in the hearing. Lanette Butt appeared on the employer's behalf and presented testimony from one other witness, Adam Kuhl. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 20, 2007. As of about August 4, 2010 she worked full time as a cashier in the employer's Altoona, Iowa store, working about four overnight shifts per week. Her last day of work was the shift that began on the evening of January 6 and ended on the morning of January 7, 2011. The employer suspended her on the afternoon of January 7 and discharged her on January 11, 2011. The reason asserted for the discharge was making unauthorized refunds after being instructed not to do so.

The claimant had a problematic employment history with the employer; her transfer to the employer's Altoona store in August 2010 was her seventh transfer, with the prior transfers resulting from a variety of issues with coworkers and managers. She was advised in August 2010 that this was the last transfer she would be allowed.

On October 12 the claimant had made a credit refund to a customer in the amount of about $77.00 on a $94.00 charge because the additional cost was due to a gas overflow. While the customer had left the hose unattended, the claimant felt the employer could have liability due to a failure of an automatic shut off on the nozzle, and further felt at risk due to the customer's

anger at the charge, so she issued the credit. As a result, the store manager, Mr. Kuhl, gave the claimant a verbal reprimand in which he informed her that she could give no further refunds.

On November 5 the claimant was given a written warning for two register issues, one of which related to a claim by a customer that he had not been given five lottery tickets he had paid for on a prior day, so that the claimant gave the customer five lottery tickets. The claimant asserted that since she was the person who had rung up the original sale and knew the customer had paid for five tickets, she was authorized to issue the tickets. The warning from the employer advised her that the written policy specified the procedure for a discrepancy was for the clerk to take the customer's name and phone number and allow a manager to resolve the issue. The warning indicated that further violation could result in additional discipline including discharge.

On December 25 the claimant issued a refund of $3.18 to a customer who indicated that she had not been given the sale price on a purchase the prior day. The customer indicated to the claimant that the assistant manager had been challenged on the price but would not honor the posted sale price on the items. The claimant accepted the customer's statement and issued the refund.

The employer became aware of the additional refund when the transaction history was reviewed on December 26. The employer did not confront the claimant regarding the situation or indicate additional discipline would be taken until Mr. Kuhl approached the claimant when she came in for her shift on the evening of January 6. He then forwarded the information to the area supervisor, Ms. Butt, who contacted the claimant on the afternoon of January 7 and suspended her. On January 11 Ms. Butt recontacted the claimant and informed her she was discharged.

The claimant asserted that the true reason she was discharged was retaliation for her complaints of sexual harassment and other incidents in which she had been involved in which she believed she had information contrary to the employer's interests. However, she has not established that when the employer was determining to discharge her there was any consideration given to anything other than the refund issues. She asserted that even though she knew she had been told not to give any more refunds, she had done so because it was the proper thing to do, and that she figured that if she failed to give the refund, she would be written up for failure to do so. She has not established that Mr. Kuhl had a practice of writing her up for not doing things, particularly things she had previously been instructed not to do.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer.

871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the additional unauthorized refund made by the claimant to a customer on December 25 after having been told she could not make any more refunds. Ordinarily the administrative law judge would consider this as disqualifying misconduct. However, here there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred 12 days prior, and the employer was aware of its occurrence 11 days prior to the employer's initial communication to the claimant on January 6 that further disciplinary action was pending. Even if the employer wished to expend the time prior to discharge to ensure it had thoroughly investigated, in order for the act to be "current" there needed to have been some notification to the claimant that some investigation or action was pending at least within a short time after the employer became aware of the additional refund. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 18, 2011 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs