

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LISA CLARK**  
Claimant

**APPEAL NO. 09A-UI-16393-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GIT-N-GO CONVENIENCE STORES INC**  
Employer

**Original Claim: 09-27-09  
Claimant: Respondent (4-R)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.4-3 – Able and Available for Work  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 22, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 7, 2009. The claimant participated in the hearing. Lanette Butt, Supervisor, participated in the hearing on behalf of the employer. The claimant has separated from her employer since the time of the October 22, 2009, decision about whether she was still working the same hours. The parties waived their right to a fact-finding interview regarding the claimant's separation from her employment with this employer.

**ISSUES:**

Whether the claimant was working the same hours as contemplated in the original contract of hire from the week ending October 3, 2009, until her separation date of November 3, 2009.

Whether the employer discharged the claimant for work-connected misconduct.

Whether she is overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was working as a full-time cashier for Git-N-Go when her hours were decreased from 50 per week to 30 per week. The employer agrees the claimant's hours were reduced when she was moved to another store. The employer's pay periods run from Wednesday to Tuesday. The week of September 30, 2009 to October 6, 2009, the claimant worked 30 hours; the week of October 7, 2009 to October 13, 2009, she worked 30 hours; the week of October 14, 2009 to October 20, 2009, she worked 30 hours; the week of October 21, 2009 to October 27, 2009, she worked 34 hours; and the week of October 28, 2009 to November 3, 2009, she worked 38 hours. The employer had extra shifts available for her October 14 and October 25, 2009, but

the claimant was unable to work those days and declined the employer's offer of work. The claimant was separated from this employer November 3, 2009.

The claimant was employed as a full-time cashier for Git-N-Go from June 2, 1998 to November 3, 2009. She received a written warning February 13, 2009, for failing to change the gas prices; she received written warnings April 1, 2009, April 8, 2009, May 21, 2009, September 6, 2009, and October 10, 2009, for failure to stock the coolers and/or not sweeping and mopping the floor, taking the trash out, and failing to place the boards in the door tracks so the doors could not be opened after closing. She received written warnings February 16, 2009, June 17, 2009, August 31, 2009, and September 16, 2009, for unexplained cash and lottery shortages. She received a written warning May 5, 2009, for continued customer complaints for not providing service to drive-through customers in a timely manner causing them to have to wait from five to ten minutes and to honk their horns or knock on the window. Her employment was terminated November 3, 2009, after a grocery delivery October 30, 2009, was not put away even though the claimant worked eight hours that day.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not working the same hours as contemplated in her original contract of hire.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The employer agreed the claimant was not working the same hours from the week ending October 3, 2009 through the week ending October 31, 2009, because she started working at different stores. Her hours were reduced from 50 per week to between 30 to 38 hours per week. Consequently, the administrative law judge concludes the claimant is eligible for benefits from the week ending October 3, 2009 through the week ending October 31, 2009.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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 claimant received 11 written warnings between February 13, 2009 and November 3, 2009. Most of the warnings were for failure to complete her job duties, especially the stocking of the coolers, which was a very important duty for a cashier. She was also warned about timely customer service and cash shortages. The claimant testified that sometimes she became frustrated and said, "The heck with it;" that she had a "time period" where she sometimes had a bad night and did not feel like staying to finish her required duties; and that she sometimes said, "The hell with it" after her hours were cut. The administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied effective the week ending November 7, 2009.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The October 22, 2009, reference 01, decision is modified in favor of the appellant. The claimant was not working her same hours beginning the week ending October 3, 2009, and is eligible for benefits until her separation date of November 3, 2009. She was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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