

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHUNTEE T GREEN
Claimant

APPEAL NO: 17A-UI-13178-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 11/12/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 11, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 16, 2018. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Jim Musser, District Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time store manager for Dollar General from November 12, 2013 to November 14, 2017. He was discharged for improperly disposing of 13 bags of merchandise.

At the beginning of November 2017, the assistant store manager observed an individual enter the store and begin taking pictures and video of the store with his cell phone. That individual then left the store and went to the back of the store where he proceeded to begin loading black trash bags from the store into his car. The assistant manager approached him at that point and asked what he was doing and the individual stated the claimant told him the bags were outside and he could come and get them. The customer had already placed approximately ten bags in his car and the assistant manager told him he could not do that. The individual apologized, got in his vehicle and left. The assistant manager picked up the remaining three bags and brought them inside and called District Manager Jim Musser to explain what she had observed. Mr. Musser told the assistant manager to review the store video to see if the claimant placed the bags outside. She did so and did see the claimant take the bags out the back door. Mr. Musser went to the store approximately two days later to watch the video himself and after doing so he contacted Loss Prevention Officer Bob Orech. They scheduled an interview with the claimant

November 14, 2017, which was the next date Mr. Orech was available. During the meeting with the claimant, he admitted he took the bags outside without checking what was in the bags to see if there was anything of value but also argued it was all one cent merchandise and of no value. Mr. Orech instructed the claimant to open the remaining three bags which all contained about 25 full price toys with an average value of \$7.50. The employer never sends toys back to the warehouse but always keeps them in the store. The claimant then said he donated the toys to a local charity and was able to state the policy the employer used when donating items, including involving the district manager and the paperwork required for tax deductions but did not follow the policy.

The claimant received smart coaching warnings September 30 and October 25, 2017, due to the conditions of his store and received three poor quality store visit scores on June 3, June 30 and September 29, 2017.

After reviewing the last incident and the claimant's previous warnings, the employer terminated the claimant's employment for violation of policy.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,892.00 for the four weeks ending December 23, 2017.

The employer did not personally participate in the fact-finding interview but did submit some written documentation prior to the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant gave conflicting accounts of what was in the 13 trash bags, first stating it was one cent items or throwaway merchandise and then when the remaining three trash bags were discovered to contain full price toys, stated he was donating the items. He did not follow the proper procedure for one cent items or donation of merchandise. The employer does not throw items away. With the exception of toys, merchandise that does not sell after being marked down must be returned to the warehouse. Donations must be done through the district manager and paperwork completed for tax purposes. While the claimant could accurately state all of the employer's policies, he failed to follow any of the employer's policies for one cent items or donations. The three trash bags the assistant manager managed to prevent the outside individual from taking were conservatively worth \$562.50 and there were actually a total of 10 additional trash bags full of merchandise taken.

Under these circumstances, 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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide

detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

The claimant filed for unemployment insurance benefits with an effective date of November 12, 2017. He received \$1,892.00 for the four weeks ending December 23, 2017, following his separation from employment. The employer provided the name and number of Douglas Lentes as the person who would participate in the fact-finding interview December 8, 2017, at 8:20 a.m. The fact-finder called Mr. Lentes but he was not available. The fact-finder left a voice mail message with the fact-finder's name, phone number, and the employer's appeal rights. The employer did not respond to the message. The employer provided some documents for the fact-finding interview prior to the interview but did not identify the dates or submit the specific rule or policy that the claimant violated and an employee with firsthand information could not be contacted for rebuttal.

In this case, the claimant has received benefits but was not eligible for those benefits. There is no evidence the claimant received benefits due to fraud or willful misrepresentation and the employer did not participate in the fact-finding interview within the meaning of the law. Consequently, the claimant's overpayment of benefits is waived as to the claimant and the \$1,892.00 in benefits the claimant received for the four weeks ending December 23, 2017, shall be charged to the employer's account.

DECISION:

The December 11, 2017, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits is waived as to the claimant and the \$1,892.00 in benefits the claimant received for the four weeks ending December 23, 2017, shall be charged to the employer's account.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn