

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA A MALLINGER
Claimant

APPEAL NO. 12A-UI-00479-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 12/04/11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated January 6, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 9, 2012. Claimant participated. The employer participated by Roger Raddatze, district manager. The record consists of the testimony of Roger Raddatze; the testimony of Joshua Mallinger; and Employer's Exhibits 1-4.

ISSUES:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

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 Dollar General store located in Des Moines, Iowa. The claimant was hired September 5, 2011, as a full-time store manager. The claimant had had previous work experience as a store manager. The claimant's last day of work was December 9, 2011. He was terminated on December 9, 2011.

The events that led to the claimant's termination started in mid November 2011, when a loss prevention audit was conducted. As part of the audit and the follow-up, surveillance tape was reviewed. The surveillance tape showed seven violations of the employer's procedures on opening and closing the store. The last violation occurred on November 28, 2011. The claimant left the bottom safe open and did not count the cash in the office. (Exhibit1) The latter violation was considered particularly serious.

On November 30, 2011, Roger Raddatze, the district manager, told the claimant that an investigation was being done concerning his opening and closing of the store. Mr. Raddatze

also informed the claimant that he did not know if this would result in a “smart coaching” or termination. Further investigation took place and it was determined that the claimant failed to protect store assets. He was terminated on December 9, 2011.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer is entitled to establish procedures and work rules and can reasonably expect that an employee will follow those rules. The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant had multiple violations of the employer's opening and closing procedures from November 13, 2011, through November 28, 2011. As store manager, the claimant had multiple responsibilities for securing the store's cash. He failed

to lock safes and turn on alarms. Cash drawers were left open with no supervision. He counted money in areas other than the office. This is not a case where there was a onetime violation or negligence in an isolated situation. Rather there is a pattern of careless actions that both violated the employer's written policies and placed the employer's cash assets at risk. The administrative law judge concludes that the employer has shown misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated January 6, 2012, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs