

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIMBERLY A STUMME
Claimant

DOLGENCORP LLC
Employer

APPEAL 17A-UI-10227-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/27/17
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 20, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 23, 2017. Claimant participated. Employer did not register for the hearing and did not participate. Official notice was taken of the administrative record with no objection.

ISSUE:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on September 20, 2017. Claimant received the decision. Claimant is not sure when she received the decision because her mail goes to a PO Box and she only checks her PO Box twice a week. Claimant testified it takes approximately three days to get mail at her address of record from Des Moines, Iowa. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by September 30, 2017. September 30, 2017 was a Saturday, therefore, claimant had until Monday, October 2, 2017 to file an appeal. Claimant went to her local Iowa Workforce Development (IWD) office on September 28, 2017 to discuss reentry into employment. Claimant also discussed with an IWD employee her denial of benefits decision (reference 01). The IWD employee told claimant she was eligible for benefits for six more weeks. The appeal was not filed until October 3, 2017, which is after the date noticed on the unemployment insurance decision. Claimant filed her appeal after she received an unemployment insurance decision finding her overpaid benefits.

Claimant was employed full-time as a team leader from May 2017, and was separated from employment on August 21, 2017, when she was discharged. On August 21, 2017, the store manager Rebecca told claimant she was being discharged because her cash register drawer was short \$3.74 from the day before. On or about August 20, 2017, when claimant left the store, she was aware her cash register drawer was short \$3.74. Claimant is not sure why her cash register drawer was short \$3.74. Claimant did not intend to have her cash register drawer be short \$3.74. Claimant testified her cash register drawer may have been short because another employer used her cash register drawer.

Claimant testified the employer has a policy that if an employee's cash register drawer is off: \$0 to \$1.99 no write up; \$2.00 to \$14.99 is a write up; and \$15.00 to \$19.99 is another write up; and \$20.00 or above is an automatic discharge. Claimant was aware of the policy.

Prior to August 20, 2017, claimant's cash register drawer was over \$10.00, but another employee's cash register drawer was short \$10.00. The employer gave claimant a final written warning for this incident. Claimant had other warnings for sliding merchandise and for not making a deposit.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Claimant's failure to file an appeal within the appeal period was solely because of incorrect information received from an IWD employee. On September 28, 2017, claimant met with an IWD employee and discussed the decision denying her benefits. The IWD employee told claimant she was still eligible for six more weeks of benefits; however, claimant later found out after she received the overpayment decision that his information was incorrect. After claimant found out about the misinformation upon receipt of the overpayment decision, she timely appealed. This delay was prompted by and perpetuated by the agency. See, Iowa Admin. Code r. 871-24.35(2). Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. The administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of

misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(5) provides:

Discharge for misconduct.

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

Claimant testified she did not intentionally cause her cash register drawer to be short \$3.74 on or about August 20, 2017. Claimant credibly testified that the reason for the shortage may have been from another employee using her cash register drawer. The employer failed to present any evidence of claimant's misconduct or to rebut claimant's testimony regarding the possible reason for her cash register drawer shortage. "Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification." Iowa Admin. Code r. 871-24.32(4). Although claimant may have had a final written warning regarding her cash register not properly balancing, the employer did not present any evidence that claimant "demonstrated a wrongful intent on [her] part." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The employer has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

DECISION:

The September 20, 2017, (reference 01) unemployment insurance decision is reversed. Claimant's appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs