

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**AUDREAN L EASLEY
4405 NE 34TH ST
DES MOINES IA 50317**

**DOLGENCORP INC
DOLLAR GENERAL
C/O COMPENSATION TAX MANAGEMENT
PO BOX 34150
LOUISVILLE KY 40232-4150**

**Appeal Number: 05A-UI-03639-RT
OC: 02/13/05 R: 02
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, Dolgencorp, Inc., doing business as Dollar General, filed a timely appeal from an unemployment insurance decision dated March 31, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Audrean L. Easley. After due notice was issued, a telephone hearing was held on April 27, 2005, with the claimant not participating. Although the claimant did call in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge twice tried to call that number at 10:01 a.m. and again at 10:03 a.m. he reached the same voice mail. The voice mail indicated the claimant was not there and might probably be on the internet. The administrative law judge twice left messages that he was going to proceed with the hearing and that if the claimant wanted to participate in the hearing, she needed to call before the hearing was over and the record was

closed. The administrative law judge provided an 800 telephone number for the claimant to use. The hearing began when the record was opened at 10:06 a.m. and ended when the record was closed at 10:16 a.m. and the claimant had not called during that period of time. The number the claimant called in for the hearing was the same number as is contained in Iowa Workforce Development records. Kristi Carter, Store Manager for the employer's store in Ankeny, Iowa, where the claimant was employed, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The claimant called the Appeals Section at 11:28 a.m. on April 27, 2005 and left a message for the administrative law judge to call her. The administrative law judge called the claimant at 12:44 p.m. The claimant stated that she did not get the voice mail messages left by the administrative law judge but that she had not checked her voice mail. The administrative law judge explained that he had twice tried to call the claimant at 10:01 a.m. and 10:03 a.m. and got a voice mail message that the claimant was not there and was probably on the internet. The administrative law judge left messages both times that he was going to proceed with the hearing and if the claimant wanted to participate she needed to call before the hearing was over and the record was closed. The administrative law judge in the voice mail included an 800 telephone number for the claimant to call. The claimant did not do so. The administrative law judge informed the claimant that he had begun the hearing when the record was open at 10:06 a.m. and ended the hearing when the record was closed at 10:16 a.m. and could not now take evidence from the claimant. The claimant informed the administrative law judge that she somehow shared a phone line. However, the claimant admitted that she knew the hearing was at 10:00 a.m. Whenever a party calls in a telephone number where the party can purportedly be reached for the hearing, that party is told that if the administrative law judge has not called that party at five minutes after the time for the hearing, the party should call the administrative law judge. The claimant did not deny receiving that information, but concedes she did not call the administrative law judge until 11:28 a.m. an hour and a half after the hearing was scheduled to start. The claimant stated that she did not call because she was getting her son ready for school. The claimant then stated that she did not realize until 11:00 a.m. that she had not been called. This is not particularly credible because the claimant did not call until 11:28 a.m. The claimant conceded basically that she had forgotten the hearing. The administrative law judge informed the claimant that he would treat her telephone call as a request to reopen the record and reschedule a hearing made after the hearing had been held and the record was closed.

The administrative law judge believes that the following rule is relevant:

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown,

the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The administrative law judge concludes that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing. The claimant knew when the hearing was, at 10:00 a.m., but did not call the Appeals Section for an hour and one-half. The claimant admitted that basically she forgot about the hearing. The administrative law judge is not even convinced that the claimant was not on the telephone line when he called at 10:01 a.m. and again at 10:03 a.m. Even if the claimant was not on the line and her phone was busy, it was incumbent on the claimant to ensure that she had a telephone that worked properly and was available at the time of the hearing and was awaiting the call, and, if not called, to call the Appeals Section back five minutes after the time of the hearing. The claimant did none of these. Accordingly, the administrative law judge concludes that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing and her request therefore is hereby denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer most recently as a full time assistant manager from September 26, 2003 until she was discharged on February 18, 2005. The claimant was discharged for hiring a relative, which is clearly prohibited by the employer's policy. The employer has a rule in its handbook, a copy of which the claimant received and for which she signed an acknowledgement prohibiting the hiring of relatives including cousins. Some time in January 2005, the claimant brought to the Store Manager, Kristi Carter, the employer's witness, an application for an individual. The claimant told Ms. Carter that this individual was a "friend of the family." That person was hired on January 28, 2005. On or about February 5, 2005, Ms. Carter learned that the person hired was actually a cousin of the claimant. Ms. Carter contacted her superiors. The employer determined to give the claimant an opportunity to transfer to another store, advance, or be promoted to another store, or remain as an assistant manager in a choice of other stores, but that she could not remain at the store in Ankeny, Iowa. The claimant refused all of these options and was discharged.

Pursuant to her claim for unemployment insurance benefits filed effective February 13, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,207.00 per week for 9 weeks from benefit week ending February 19, 2005 to benefit week ending April 30, 2005. For some of those weeks the claimant had earnings, which reduced or cancelled her benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer's witness, Kristi Carter, Store Manager at the employer's store in Ankeny, Iowa, where the claimant was employed, credibly testified, and the administrative law judge concludes, that the claimant was discharged on February 18, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Ms. Carter credibly testified that the employer has a policy in its handbook, a copy of which the claimant received and for which she signed an acknowledgement, prohibiting the hiring at the same location of relatives including cousins. Ms. Carter also credibly testified that some time in January 2005 the claimant brought an application to her for an individual to be hired. The claimant told Ms. Carter that this was merely a "friend of the family." This person was hired on January 28, 2005. However, Ms. Carter learned on February 5, 2005 that this person was a cousin of the claimant. Accordingly, the hiring of this person was a clear violation of the employer's policy. The claimant was given ample opportunities to transfer to another location or advance or be

promoted to another location or remain an assistant manager in a choice of stores, but she refused all of these opportunities and was discharged. In the absence of any evidence to the contrary, the administrative law judge is constrained to conclude, that because of the employer's clear policy prohibiting the hiring of relatives including cousins and the claimant's false statement that the person hired was merely a friend of the family, the administrative law judge concludes that claimant's act was a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,207.00 since separating from the employer herein on or about February 18, 2005 and filing for such benefits effective February 13, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision dated March 31, 2005, reference 02, is reversed. The claimant, Audrean L. Easley, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$1,207.00.

kjf/pjs