

**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**

**BETTY HARDING
101 CENTER
PO BOX 483
NORWALK IA 50211-0483**

**DOLLAR GENERAL
SUNSET DR
NORWALK IA 50211**

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

**Appeal Number: 06A-UI-00385-RT
OC: 11-27-05 R: 02
Claimant: Respondent (1)**

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 96.6-2 – Initial Determination (Timeliness of Appeal)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Dolgencorp, Inc., doing business as Dollar General, filed an appeal from an unemployment insurance decision dated December 22, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Betty Harding. After due notice was issued, a telephone hearing was held on January 26, 2006, with the claimant participating. Lori Sweet, Manager of the employer's store in Norwalk, Iowa, participated in the hearing for the employer. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the

claimant. This appeal was consolidated with appeal number 06A-UI-00386-RT, for the purposes of the hearing with the consent of the parties.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An unemployment insurance decision dated December 22, 2005, reference 01, determined that the claimant was eligible to receive unemployment insurance benefits because records indicate she was dismissed from work on November 21, 2005, for alleged misconduct but the employer did not furnish sufficient evidence to show misconduct. This decision was sent to the employer at its local address in Norwalk, Iowa, on that same day, December 22, 2005. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeal's Section on January 3, 2006 (the decision actually said January 1, 2006, but because this was a Sunday and the next day would be a holiday, the appeal would be due the next business or working day). However, as shown at Department Exhibit One, the employer's appeal was faxed to the Appeal's Section on January 12, 2006, making the appeal nine days late. The appeal was dated January 12, 2006. The reason for the delay was that the initial decision was sent to the wrong address. That decision should have been sent to the employer's representative, Compensation Tax Management at the address shown on this decision. It was not but rather sent to the local store in Norwalk, Iowa. The local store then had to forward the decision on which caused a delay. A second decision dated January 3, 2006, reference 03, was sent to the employer at the proper address and the employer's appeal was timely in regards to that decision.

Because the administrative law judge hereinafter concludes that the employer's appeal was late but that the employer has demonstrated good cause for a delay in the filing of its appeal, the administrative law judge further finds: The claimant was employed by the employer, most recently for over five years as an assistant manager, from September 14, 1999 until she was discharged on November 21, 2005. The claimant was discharged for a missing deposit that she had made on September 4, 2005. On that day the claimant was the morning manager and was supposed to deposit the checks and cash from the previous day's sales, September 3, 2005. The claimant took the deposit bag and signed it out and took it to the bank and deposited it. However, the deposit ended up missing. The amount of the deposit was a little more than \$2,500.00. The local store in Norwalk, Iowa, where the claimant was employed, learned of this on October 20, 2005, when the district manager notified the store after the district manager had been notified by the main office that the deposit was missing. The claimant was then questioned. Because the claimant felt extremely bad and the missing deposit "just got her" she repaid the employer for the missing deposit. The claimant did not take the money and could not account for why or how it was missing. Because the old district manager was leaving and a new district manager came on and there was some efforts to keep the claimant employed, the claimant was not discharged until November 21, 2005, when the home office so directed the employer's witness, Lori Sweet, Manager of the local store in Norwalk, Iowa, to discharge the claimant. She did so by telephone on November 21, 2005.

The claimant had made hundreds of such deposits before without having any missing. The claimant had been an assistant manager for over five years. The claimant had never received any relevant warnings or disciplines including warnings or disciplines for improper deposits or improper cash handling practices. Ms. Sweet had never had any problems with the claimant until the missing deposit.

Pursuant to her claim for unemployment insurance benefits filed effective November 27, 2005, the claimant has received unemployment insurance benefits in the amount of \$635.00 as follows: \$174.00 for benefit week ending December 3, 2005 (earnings \$66.00); \$192.00 for two weeks, benefit weeks ending December 10 and 17, 2005; and \$77.00 for benefit week ending December 24, 2005 (earnings \$163.00).

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal of the decision dated December 22, 2005, reference 01, or, if not, whether the employer demonstrated good cause for such failure. Although the employer's appeal was not timely, the employer has demonstrated good cause for a delay in the filing of its appeal and the appeal is, therefore, accepted, and the administrative law judge has jurisdiction to reach the remaining issues.
2. Whether the claimant's separation from employment was a disqualifying event. It was not.
3. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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, subsection 10, 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.

871 IAC 24.35(1) provides:

(1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:

a. If transmitted via the United States postal service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by

statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for a delay in the filing of its appeal. The administrative law judge concludes that although the employer's appeal was not timely, the employer has demonstrated by a preponderance of the evidence that it had good cause for a delay in the filing of its appeal. On its face, as shown at Department Exhibit One and as set out in the Findings of Fact, the employer's appeal was nine days late. The reason the employer's appeal was late was because Iowa Workforce Development sent the decision from which the employer now seeks to appeal to the wrong address. It sent the decision to the employer's local store in Norwalk, Iowa, instead of to the address of the employer's representative for unemployment insurance benefit purposes, Compensation Tax Management Corporation. The local office had to forward the decision on and this caused the delay in the filing of the appeal. The administrative law judge notes that a second decision was sent to the correct address on January 3, 2006, and the employer timely filed an appeal of that decision. Accordingly, the administrative law judge concludes that the employer's delay in filing the appeal was because of error or misinformation on the part of Iowa Workforce Development and this is good cause for a delay in the filing of its appeal. Therefore, the administrative law judge concludes that although the employer's appeal was not timely, the employer has demonstrated good cause for a delay in the filing of its appeal and, as a consequence, the employer's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on November 21, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Lori Sweet, Manager, credibly testified that the claimant was discharged because of a missing deposit the claimant made on September 4, 2005. Ms. Sweet credibly testified that the claimant was the morning manager on that date and was supposed to then deposit the checks and cash from the previous day's sales, September 3, 2005. Ms. Sweet further testified that the claimant had signed out the deposit bag. The claimant agreed with all of this and credibly testified that she was aware of that day because it was the day before Labor Day and that she specifically remembered taking the deposit to the bank and believes that she had deposited it between 1:30 p.m. and 2:00 p.m. The claimant credibly testified that she did not take the money and could not account for the money. There is no evidence that the claimant took the money only that she was the one who made a deposit which ended up missing. The claimant did pay the employer back for the amount of money that was missing. The administrative law judge does not believe that this establishes that the claimant took the missing deposits or even that the claimant was responsible for the missing deposits. The claimant credibly testified that she felt bad and the missing deposit "just got her." Therefore, the claimant paid the money back. The claimant had never received any relevant warnings or disciplines. The claimant had made hundreds of deposits before, and in her five plus years as assistant manager and her six plus years of employment Ms. Sweet had never had any problems with the claimant before.

The administrative law judge is constrained to conclude that there is not a preponderance of the evidence of any deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and obligations arising out of her worker's contract of employment or any acts evincing willful or wanton disregard of the employer's interests or any acts that were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At the very most, the claimant's act concerning the deposit was ordinary negligence in an isolated instance and is not disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily

serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

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 \$635.00 since separating from the employer herein on or about November 21, 2005, and filing for such benefits effective November 27, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of December 22, 2005, reference 01, is affirmed. The claimant, Betty Harding, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein. Although the employer's appeal was not timely, the employer has demonstrated good cause for its delay and the employer's appeal is, therefore, accepted.

kkf/kjw