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

WILLIAM W MCNULTY
281 – 25TH AVE N
CLINTON IA 52732

FAMILY DOLLAR SERVICES INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-04539-RT
OC: 04-03-05 R: 04
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, Family Dollar Services, Inc., filed a timely appeal from an unemployment insurance decision dated April 18, 2005, reference 01, allowing unemployment insurance benefits to the claimant, William W. McNulty. After due notice was issued, a telephone hearing was held on May 19, 2005, with the claimant participating. Taryn Barrett, Area Human Resources Manager, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Because the claimant was using a cell phone, the claimant was disconnected at 3:09 p.m. and the

administrative law judge called the claimant back and was able to reach him and the claimant remained on the line for the balance of the hearing and participated in the balance of the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time shipping checker from March 11, 2002 until he was discharged on March 31, 2005. The claimant was discharged for unacceptable job performance and in particular, making mistakes in his paperwork including load diagrams. It is essential for the claimant, as a shipping clerk, to make out the paperwork correctly so that merchandise is placed on the right truck and sent to the right location. On March 25, 2005, the claimant made errors in the load diagrams and in completing a bill of lading. He put on the wrong seal number which goes on the semi trailer. This causes problems in getting the right merchandise to the right destination and also causes the employer additional paperwork problems. On March 28, 2005, the claimant again made errors in load diagrams and also put mail in the wrong trucks. The employer sends out mail to the various stores on its trucks but the claimant put the mail on the wrong trucks and the mail ended up in different locations. The employer then obtained the necessary documentation and supporting information and reviewed the file and discharged the claimant on March 31, 2005.

The claimant received a number of warnings for similar conduct. On March 20, 2005, the claimant received a written warning called a corrective action review for making errors on the load diagram. The claimant did make such errors on the load diagram. The claimant put incorrect store numbers on the load diagrams and did not indicate the routing numbers. On March 10, 2005, the claimant received another written warning called a corrective action review for similar errors. He made errors on at least two load diagrams including putting the same seal number on two different load diagrams. The claimant did make those mistakes. On March 24, 2005, the claimant received a third corrective action review, this one was a final written counseling. This warning was also for a mistake on load diagrams including no seal numbers and no load percentages. Finally, the claimant was given a fourth corrective action review on March 30, 2005, which was really his discharge. There are no other reasons for the claimant's discharge.

The claimant testified that he made these errors because he had problems with his diabetes medication causing him to be dizzy or drowsy and that he would lose his thoughts. The claimant became concerned and consulted his physician in late December 2004 who prescribed a different medication which helped for a while but then the claimant began making mistakes again. The claimant again consulted his doctor in late January and he tried another medication which helped for a time but caused the claimant additional problems. The claimant did not consult his physician thereafter. The claimant stated he did not because he was terminated. However, the claimant received two written associate corrective actions in March prior to his discharge but long after he had consulted his physician for a second time.

At the end of December 2004 the claimant asked his supervisor if he could be moved to a different position. The supervisor said he would check but never got back to the claimant with the final word. However, employees are free to apply for any positions available which are posted on a board. The claimant never filed for any positions; first, because he was going on a medical leave and then he was placed on light duty and after March 24, 2005, the claimant could not apply for positions because he had received a final written counseling or corrective

action which prohibited him from being transferred. The claimant's surgery was sometime in January and so the claimant had two months to apply for a different position even if he was on light duty. Pursuant to his claim for unemployment insurance benefits filed effective April 3, 2005, the claimant has received unemployment insurance benefits in the amount of $2,170.00 as follows: $310.00 per week for seven weeks from benefit week ending April 9, 2005 to benefit week ending May 21, 2005.

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. He 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:
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> 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 March 31, 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. There is really very little disagreement between the witnesses in substance. Beginning in December 2004, the claimant began making numerous significant errors on his paperwork including load diagrams. As a shipping checker, it was essential for the claimant to make his paperwork correct and insure that his paperwork was correct. The claimant made errors on his paperwork including load diagrams which the claimant is to prepare and which then insures that the merchandise is sent to the appropriate destinations. The claimant received a written corrective action review on December 20, 2004 for errors in the load diagrams including incorrect store numbers and not indicating routing numbers. The claimant persisted in these errors and got a second written associate corrective action review on March 10, 2005 for errors on his paperwork including load diagrams and in this case, among other things, put the same seal number on two different load diagrams. The claimant received yet a third written corrective action review which was a final counseling on March 24, 2005 for more paperwork errors including mistakes on the load diagrams and no seal numbers on load diagrams and no load percentages. Thereafter the claimant made mistakes again on paperwork including a bill of lading on which he put the wrong seal number on March 25, 2005 and on March 28, 2005 errors in the load diagram and he placed the mail in the wrong trucks. The employer delivers mail to its stores through its trucks and the claimant put the mail in the wrong trucks and the mail was delivered to the wrong stores. The claimant was then discharged. There is no evidence that the claimant's mistakes and errors in paperwork were either deliberate or willful. However, the administrative law judge is constrained to conclude that the claimant's errors were negligence or carelessness in such a degree of recurrence as to establish disqualifying misconduct.

The claimant testified that his errors were caused by diabetes medication he was taking which made him dizzy or drowsy and caused him to lose his thoughts. The claimant testified that he became concerned about this and consulted his physician in late December who changed the medicine. The new medicine helped for a while but then he began to make mistakes again. The claimant testified that he again consulted his physician in late January 2005 in connection with some surgery he was having and the physician again prescribed different medicine which helped for a while but then caused him problems again. The claimant thereafter did not consult his physician again. However, the last time the claimant consulted his physician was in late January 2005 but the claimant received two additional written corrective action reviews in March and the claimant did not bother to consult his physician at that time. When the claimant received the additional written corrective action reviews, he should have immediately consulted his physician because the claimant was aware of the importance of correct, accurate paperwork. The claimant did not consult his physician again.

The claimant testified that he asked to be transferred to a different position at the end of December and his supervisor said he would get back to him but never did. However, the evidence does establish that the claimant at any time could apply for any position posted on a board. The evidence also establishes that the claimant never applied for any such positions. The claimant first testified that he did not apply because he was prohibited from doing so because of his warnings. However, the claimant was only prohibited from applying for a different position upon the receipt of his final written counseling on March 24, 2005. The claimant was free to apply for positions at any time prior to that date. The claimant did not. The claimant then testified that he did not apply for such positions because he was going on a

leave for his surgery and then did not apply thereafter because he was on light duty. However, the administrative law judge believes that while the claimant was on light duty would have been the perfect time for him to apply for another position especially after he received his second written corrective action review on March 10, 2005. The claimant had two months after being placed on light duty to apply for another position before his final written counseling which then prohibited him from applying for different positions. The claimant did not do what he should have done to insure that he maintained employment in view of his problems with his medicine. He did not consult his physician when necessary nor did he apply for other positions when he could. The claimant finally testified that there were no positions on the board suitable to him. However, this was not the claimant's testimony earlier when he said that there were other positions that were suitable to him and also conflicts with the credible testimony of the employer's witness, Taryn Barrett, Area Human Resources Manager. On the evidence here, because the claimant did not take the actions that a reasonable person would in view of the importance of accurate and correct paperwork and in view of the mistakes the claimant was making on his paperwork and the warnings that he was receiving, the administrative law judge must conclude that the claimant's acts were carelessness and negligence in such a degree of recurrence as to establish disqualifying misconduct.

The administrative law judge is not without significant sympathy for the claimant. The claimant's medicine was obviously interfering with his work. However, the claimant did not do what he could have and should have done to continue his employment with the employer in some other capacity or with a change in medication. The claimant was aware, or should have been aware, that his job was in serious jeopardy. The administrative law judge notes that the claimant's medical condition was not job related and that if he had voluntarily left his employment because of this he would have been disqualified to receive unemployment insurance benefits until he could certify his recovery and that he could do the job certified by a physician and returned to the employer and offered to go back to work and no suitable comparable work was available. The claimant did not quit here but the administrative law judge believes that this result in a quit is relevant here. Finally, in White v. Employment Appeal Board, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa Supreme Court held that the Employment Security Law is not designed to provide health and disability insurance and only those employees who experience illness induced separations that can fairly be attributed to the employer are possibly eligible for employment benefits. The administrative law judge reluctantly concludes that the claimant is not entitled to unemployment insurance benefits.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he 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.
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> 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 $2,170.00 since separating from the employer herein on or about March 31, 2005 and filing for such benefits effective April 3, 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 of April 18, 2005, reference 01, is reversed. The claimant, William W. McNulty, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of $2,170.00.

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