IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAMELA S MOELLER
Claimant

DOLGENCORP LLC
Employer

APPEAL NO. 17A-UI-11016-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/01/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Dolgencorp (employer) appealed a representative's October 20, 2017, decision (reference 01) that concluded Pamela Moeller (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 14, 2017. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer was represented by Gilda Slomka, Hearings Representative, and participated by David Draves, District Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 7, 2013, as a full-time store employee. The claimant signed for receipt of the employer's handbook on April 17, 2017, when she became a store manager. The handbook states, "Managers are prohibited from making payroll modifications which adversely impact an employee's pay. Falsifying time worked is prohibited and could result in disciplinary action up to and including termination. Employees should clock in and out before and after meal periods of 30 or more uninterrupted minutes..." The employer did not issue the claimant any warnings during her employment. The employer is usually required to issue employees a verbal warning, written warning, and final written warning before the termination is given except in specific cases.

An assistant manager told the employer that the claimant changed her timecard to reflect time for lunch. The assistant manager said she did not take lunch on the day in question even though the handbook requires employees to take a lunch break. The claimant told the employer she clocked the assistant manager out three times for her lunch break. The claimant and the assistant manager were eating together. She also clocked out another employee for not

working one hundred-percent. The claimant understood this was a widespread practice. All of the dates are unknown.

The employer did not issue the assistant manager a warning for working when she should have been taking her lunch break or claiming she was working when she was having lunch with the claimant. The assistant manager continues to work for the employer. She had not received any warnings prior to the claimant's separation. The employer terminated the claimant on October 2, 2017 for editing employee's time cards on unknown dates.

The claimant filed for unemployment insurance benefits with an effective date of October 1, 2017. The employer participated personally at the fact finding interview on October 19, 2017, by David Draves.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on an unknown date. The claimant was discharged on October 2, 2017. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge.

In addition, it appears the employer treated the claimant and the assistant manager disparately for their similar infractions. The assistant manager continues to work for the employer. The claimant was discharged. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's October 20, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs