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

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DOLGENCORP INC
DOLLAR GENERAL
C/O COMP TAX MGR
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LOUISVILLE KY 40232

Appeal Number: 05A-UI-08527-JTT
OC: 07/17/05 R: 04
Claimant: Appellant (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

STATEMENT OF THE CASE:

Nancy Riley filed a timely appeal from the August 15, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 1, 2005. Ms. Riley participated. District Manager Shawn McGarvey represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nancy Riley was employed by Dollar General as a full-time store manager from May 1, 2004 until July 14, 2005, when District Manager Shawn McGarvey discharged her for misconduct.

Ms. Riley managed the employer's store in West Union and supervised four employees, all of whom were full-time. The employer's freight delivery truck would frequently arrive late in the

day on Fridays. Friday afternoons represented the very end of the weekly pay period and the employees would at that time have worked all of their full-time hours. The freight deliveries involved, on average, 1,000 pieces of inventory. It would take approximately 3½ hours to unload the freight truck and process the inventory, provided that all five employees assisted in unloading the truck. The employer expected Ms. Riley to have unloaded the truck and to have moved the freight to the sales floor within 48 hours of the delivery. The employer strongly discouraged overtime pay and required Ms. Riley to contact her district manager to request permission to pay employees to work overtime. Ms. Riley understood the employer's unspoken rule to be that she should not request permission to pay overtime wages. Saturday mornings represented the start of the new weekly pay period. Ms. Riley did not have the option of waiting until Saturday morning to unload the delivery truck, as this would require the driver to remain at or near the store overnight. Ms. Riley had, at times, asked the four employees to work off the clock while unloading the freight, with the understanding that their off-the-clock hours would be reported as part of the next week's hours. Two of the four employees refused to work under the proposed arrangement. Two other employees did, in fact, accept the proposed arrangement. Ms. Riley and the two employees who worked off the clock were responding to the immediate and pressing needs of the store. Since Ms. Riley's separation from the employment, the employer has altered the timing of freight deliveries so that they occur earlier in the weekly pay period.

Ms. Riley was a diligent manager and operated a successful store. The employer had recognized Ms. Riley's successful operation of the West Union store by providing Ms. Riley with an annual bonus and by providing Ms. Riley with a positive evaluation.

Approximately, three weeks prior to Ms. Riley's discharge, an anonymous telephone call alerted the employer's corporate office of Ms. Riley's practice of having employees work off the clock and reporting these hours on the next week's payroll. The corporate office contacted District Manager Shawn McGarvey, who commenced an investigation into the allegation. As part of her investigation, Ms. McGarvey requested the relevant payroll information from the corporate office. Ms. McGarvey then interviewed four employees of the West Union store, including Ms. Riley. The employees, including Ms. Riley, confirmed the practice of working off the clock and reporting those hours on the next week's payroll. Approximately two weeks after Ms. McGarvey commenced her investigation, she met with Ms. Riley for the purpose of placing Ms. Riley on an indefinite suspension. Ms. McGarvey advised Ms. Riley that she would submit the results of her investigation to the corporate office, which would make the decision about any additional measures to be taken. Ms. McGarvey advised Ms. Riley that the corporate office might decide to discharge Ms. Riley from the employment. Ms. McGarvey knew, based on her prior experience with the company, that this was the likely outcome. Ms. McGarvey also knew that Ms. Riley had otherwise done a good job of managing the West Union store.

The employer has a policy that prohibits the practice of having employees work off the clock and/or reporting hours worked during one week as part of the payroll in another week. The employer representative did not have a copy of the policy available to her for the hearing. Ms. Riley was aware of the employer's written policy at the time she had employees work off the clock, but felt that the employer's competing expectations placed her between the proverbial rock and a hard place, such that having employees work off the clock and report the hours as part of the next week's payroll appeared a reasonable course of action.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Riley was discharged for misconduct in connection with her employment. It does not.

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).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence indicates that the employer placed Ms. Riley in the position of having to decide which of the employer's competing demands should be given the greatest weight. On the one hand the employer had a policy of not allowing employees to work off the clock. On the other

hand, the employer scheduled deliveries at Ms. Riley's store for the very end of the employees' workweek, when they had no regular work hours available. In addition, the employer had an unspoken but clear expectation that Ms. Riley not request overtime pay for the employees. Further, the employer had an expectation that the merchandise would be promptly unloaded and moved to the sales floor. Ms. Riley had a judgment call to make and made the wrong decision. The administrative law judge concludes that Ms. Riley's good faith error in judgment did not constitute misconduct that would disqualify her for unemployment insurance benefits. See 871 IAC 24.32(1)(a). See also Richers v. IDJS, 479 N.W.2d 308 (Iowa 1991).

The evidence further indicates a two-week delay between the date when the alleged misconduct came to attention of the employer and the date Ms. McGarvey suspended Ms. Riley. Based on the length of delay between these two events, the alleged misconduct no longer constituted a "current act" and, therefore, would not disqualify Ms. McGarvey for benefits. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

DECISION:

The Agency representative's decision dated August 15, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

jt/kjw