

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TINA J NORDSTROM
Claimant

DOLLAR TREE STORES INC
Employer

APPEAL 15A-UI-09869-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/09/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 28, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 16, 2015. Claimant participated. Employer participated through store manager, Barbara Loots.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an assistant manager from July 19, 2011, and was separated from employment on August 8, 2015, when she was discharged.

On August 8, 2015, Ms. Loots discovered the store deposit was short \$81.45. Ms. Loots testified that claimant pulled out \$83.00 out of her back pants pocket and offered to cover the shortage. Ms. Loots refused because it is against company policy for employees to cover shortages. Claimant testified that the money she pulled out of her pocket was not her personal money, but was actually the store's money that she needed to put in the deposit bag. Claimant testified she tried to explain this to Ms. Loots. Claimant testified she just had not had time to get the money to the deposit bag. Claimant testified that it is common practice by assistant managers and Ms. Loots to put money that goes in the safe or deposit bag in their pocket for safe keeping if they cannot get it to the deposit bag or safe immediately. Ms. Loots testified that this is not common practice, but she has done this on occasion. After Ms. Loots refused to let claimant put the money in the deposit bag, she then went out and audited claimant's drawer. Claimant was \$2.52 short in her drawer. Ms. Loots then decided to cash out claimant's drawer. Claimant pulled her drawer for Ms. Loots. Claimant's drawer was then cashed out by Ms. Loots. Ms. Loots discovered that claimant's drawer was now \$83.00 over. Ms. Loots took this as the second time claimant offered to pay for the shortage. Claimant admitted to putting the money in the drawer because she thought it was the only way to get the money in the deposit bag since Ms. Loots refused to take it from her. Ms. Loots then set claimant home. On August 9, 2015,

Ms. Loots contacted corporate and was told to suspend claimant. Ms. Loots then called claimant and told her she was suspended. On August 13, 2015, Ms. Loots terminated claimant for mixing personal funds with company funds, in violation of company policy. Claimant was aware of this policy. Claimant was not terminated for taking \$81.45 from the store. Claimant had no prior disciplinary warnings.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code § 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.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

On August 8, 2015, claimant had money that needed to be placed in the deposit bag. Claimant did not have time to put the money in the deposit bag, so she followed what she testified was the common practice and put it in her pocket for safe keeping. Claimant testified the other assistant managers and Ms. Loots would place money in their pockets for safe keeping until they could get time to go to the safe or the deposit bag. Ms. Loots admitted this happens from time to time. Before claimant could put the money in the deposit bag, Ms. Loots discovered there was a shortage of money in the deposit bag. Claimant retrieved the money from her pocket and tried to give it to Ms. Loots to put it in the deposit bag. Ms. Loots told claimant it was company policy that employees cannot use personal funds to cover the shortage. Claimant tried to explain to Ms. Loots that it was not her personal money, but she was unsuccessful. Ms. Loots then audited claimant's cash drawer and discovered it was short \$2.52. Ms. Loots then wanted to cash out the drawer, and had claimant pull the drawer. When Ms. Loots cashed out the drawer, it now had an overage of \$83.00. Claimant admitted putting the money in the drawer. Claimant testified she put the money there so it would be placed in the deposit bag since Ms. Loots was refusing to take the money from her directly. On August 13, 2015, the

employer terminated claimant for violating the company policy of mixing personal funds with company funds.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Benefits are allowed.

Furthermore, it is important to note that claimant was not discharged for stealing any money. By placing the employer's money in her pocket for safe keeping until she could properly place it in the deposit bag, claimant was just following the practices of the other assistant managers and Ms. Loots. Claimant was discharged for trying to cover a shortage with her personal money; however, claimant testified she did not try to cover the shortage with her personal money, she was merely trying to place the employer's money where it belongs. Because other employees would store money in their pockets until they had time to place it where it belongs and they were not disciplined, claimant seems to have been the subject of the disparate application of the policy, which cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The August 28, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css