

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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Appeal Number: 04O-UI-12241-JTT
OC: 08/01/04 R: 04
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

STATEMENT OF THE CASE:

Family Dollar Services (Family Dollar) filed an appeal from a decision of a representative dated August 30, 2004, reference 02, which had concluded that the claimant, Joshua Riordan, was eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on November 30, 2004. The claimant participated personally, and was represented by attorney Ben Roth. The employer participated by Taryn Barrett, Area Human Resources Manager, with witnesses Harvey Meade, Loss Prevention Manager; Carol Reimer, the company nurse; and Brian Bivona, Regional Distribution Manager. Employer's Exhibits One, Two, and Three were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, makes the following findings of fact: Mr. Riordan was employed full-time at Family Dollar's distribution center from June 2, 2004 until August 3, 2004 when he was discharged for allegedly misrepresenting the cause of a workplace injury he received on July 21, 2004.

Mr. Riordan worked as a "bulk order filler." His duties consisted of matching pre-printed routing labels--called "pick slot labels"--to boxes of bulk merchandise and then placing the boxes on a conveyer belt. The bulk merchandise was stacked on pallets. The height of the stacked bulk merchandise sometimes required Mr. Riordan to reach overhead and stretch to grab the appropriate boxes. Mr. Riordan's assigned working hours were 5:00 p.m. to 3:30 a.m. He last worked at Family Dollar on July 26.

At approximately 8:00 p.m. on July 21, 2004, Mr. Riordan dislocated his shoulder at work. Just prior to the injury, Mr. Riordan had learned from a manager that he had misplaced some pick slot labels and, therefore, failed to fill several orders. Mr. Riordan proceeded to look for the misplaced pick slot labels and in the process intentionally struck a nearby box in frustration. When Mr. Riordan struck the box, he "stiff-armed" the box—meaning that he used a backhand swing with a straight arm and open hand. Soon thereafter, Mr. Riordan was reaching overhead to grab a box of merchandise when he experienced a sudden pain in his right shoulder. Mr. Riordan was unable to lower the relatively light box for which he had been reaching.

Mr. Riordan notified his immediate supervisor, Christopher Splinter, of the injury. Family Dollar's management team dealt with the injury as a worker's compensation matter from the moment the injury was reported. Since the nurse had gone home for the day, the decision was made to transport Mr. Riordan to the emergency room. Mr. Riordan waited in pain for over half an hour before he was finally taken to the emergency room. During this period, Mr. Splinter filled out a workplace injury report, using information provided by Mr. Riordan. Mr. Riordan was unable to write due to his injury, but did scribble his signature. Family Dollar chose to make only one page of the report available at the hearing. See Exhibit One. However, at least two of Family Dollar's witnesses had the full report in hand as they testified at the hearing. At the emergency room, Mr. Riordan was diagnosed with a dislocated shoulder and advised to follow up with an orthopedist.

The next morning, Mr. Riordan contacted the company nurse, Carol Reimer. Mr. Riordan informed the nurse of the nature of the injury and the instructions to follow up with an orthopedist. Nurse Reimer instructed Mr. Riordan to meet with her at 3:00 p.m. During his meeting with Nurse Reimer, the nurse selected an orthopedist to further examine and/or treat Mr. Riordan and scheduled an appointment for him. The nurse did not believe the injury could have been work-related unless Mr. Riordan had previously suffered a similar injury. Mr. Riordan subsequently met with the specialist and returned to work on light duty status.

Sometime between July 21 and 26, another employee contacted management member Scott Hall and alleged that Mr. Riordan had misrepresented the cause of the workplace injury. Family Dollar management knows the identity of the employee but refused at the hearing to disclose the identity of the employee. The informant wrote a brief statement for Mr. Hall, alleging that Mr. Riordan had asked the informant to lie to management about the cause of the injury. Family Dollar did not make a copy of the statement available for the hearing. The informant no longer works for Family Dollar. Family Dollar management refused to discuss the circumstances under which the informant left their employ.

Mr. Hall forwarded a copy of the written statement to the Loss Prevention Manager, Harvey Meade, who commenced an "investigation" of Mr. Riordan's alleged falsification of the workplace injury report. Mr. Meade is a 27-year veteran of law enforcement, with experience as a patrol officer, detective, and chief of police for two separate police departments. Despite his years of law enforcement training, Mr. Meade never interviewed the informant. Instead, Mr. Meade relied upon the informant's written statement and a verbal report from Scott Hall. Family Dollar distributed information regarding the alleged falsified workplace injury report to various members of management and to the company nurse, along with a copy of the informant's written statement.

On July 26, Mr. Riordan had another appointment with the company nurse. Mr. Meade instructed the nurse to have Mr. Riordan report to Mr. Meade's office after the appointment. Based upon the verbal report from Scott Hall and the informant's statement, Mr. Meade concluded that Mr. Riordan had lied in the workplace injury report about the cause of his injury and that Mr. Riordan had caused his own injury when he struck the bulk merchandise box out of frustration. Mr. Meade's purpose in meeting with Mr. Riordan on July 26 was to extract a confession from Mr. Riordan.

After the appointment with the nurse, Mr. Riordan was escorted into Mr. Meade's office. Regional Distribution Manager Brian Bivona was also present. Despite the fact that Mr. Meade is the Loss Prevention Manager and there are 57 surveillance cameras in the distribution center, the closed-door interview of Mr. Riordan was not recorded. Mr. Riordan told Mr. Meade that he was on prescription painkillers. Mr. Riordan was feeling the effects of the prescription painkillers. Mr. Meade had Mr. Riordan sign an "interview consent" form. The form sets forth, in relevant part: "I also understand that as an employee of Family Dollar Stores...my cooperation in the resolution of problems effecting the Company's business is required and expected but that I am free to terminate this interview and leave at anytime." See Exhibit Three. Mr. Riordan did not believe he could leave without losing his job.

Mr. Meade interviewed Mr. Riordan for approximately 45 minutes. Throughout the interview, Mr. Meade made use of police interrogation techniques. These techniques included telling Mr. Riordan at the beginning of the interview that he had lied about the cause of his injury, and consistently and repeatedly contradicting Mr. Riordan throughout the interview when he did not provide the information Mr. Meade wanted to hear. Mr. Meade told Mr. Riordan that a surveillance camera had recorded Mr. Riordan's injury, though Meade knew this was false. Toward the end of the interview, Mr. Meade or Mr. Bivona suggested that Riordan sign a statement. Mr. Meade prepared the statement. Mr. Bivona left while the statement was being prepared but returned to sign the document. See Exhibit Two. After Mr. Meade and Mr. Bivona had Mr. Riordan's signature on the statement, they sent Mr. Riordan home on suspension. On August 3, 2004, Mr. Riordan was contacted by Family Dollar's Human Resources Department and advised that he was terminated.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that Mr. Riordan was discharged for misconduct in connection with his 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).

Because Family Dollar discharged Mr. Riordan, Family Dollar has the burden of proof in this matter. See Iowa Code section 96.6(2).

The testimony of Family Dollar's witnesses undermined the employer's argument. The employer's representative and each of Family Dollar's witnesses balked at the administrative law judge's authority, duty and/or efforts to inquire fully into the factual matters at issue. See 871 IAC 26.14-2. Mr. Bivona challenged the relevance of questions posed by the administrative law judge to further the inquiry. Ms. Reimer repeatedly expressed her concern about providing testimony not authorized by her superiors. Mr. Meade testified in a manner that the administrative law judge can only conclude was deliberately evasive and non-responsive in light of his law enforcement background and experience in providing sworn testimony.

Family Dollar's witnesses provided conflicting testimony. The conflicting testimony further called into question the credibility of Family Dollar's key witness, Loss Prevention Manager Harvey Meade. Mr. Meade testified that the employee informing against Mr. Riordan had initially contacted Ms. Reimer in addition to contacting Scott Hall. Mr. Meade further testified that Ms. Reimer had provided him with an oral report regarding the informant's statements to Ms. Reimer. Mr. Meade offered this testimony to bolster the notion that he had conducted an actual investigation into the alleged misconduct and to justify the fact that Mr. Meade never bothered to go to the source of the allegation. However, Ms. Reimer testified she had no

contact whatsoever with the informant. Mr. Meade also testified that it had been Mr. Riordan's idea to provide a written statement admitting to misconduct. Mr. Meade offered this testimony to bolster the notion that Mr. Riordan had knowingly and voluntarily confessed to misconduct. However, Mr. Bivona testified repeatedly that it was not Mr. Riordan's idea to provide the statement. Mr. Meade's testimony was not credible.

The circumstances giving rise to Exhibits Two and Three are especially troubling to the administrative law judge. Exhibit Three, the "Interview Consent" form, was executed while Mr. Riordan was under the influence of prescription painkillers. The language of the document sends the less than subtle message to Mr. Riordan that he had to cooperate fully with the interview or face termination. Exhibit Two, the so-called "Voluntary Statement," was drafted by Mr. Meade and at the insistence of Mr. Meade and/or Mr. Bivona. It was executed while Mr. Riordan was under the influence of prescription painkillers. It was executed after Mr. Meade, a former career law enforcement officer, subjected 19-year-old Joshua Riordan to an unrecorded, forty-five minute, police-style interrogation. The should be given little weight.

Allegations of misconduct or dishonesty without additional evidence are not sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982); see also 871 IAC 24.32-9. It is the responsibility of the parties to request the attendance of such witnesses they believe have knowledge of the facts in issue in the contested case. See 871 IAC 26.13-1.

Family Dollar was unwilling to furnish available evidence to corroborate the allegation that Mr. Riordan had provided false information regarding the cause of his workplace injury. It is significant that the administrative law judge was denied the opportunity to hear the testimony and weigh the credibility of the alleged eyewitness. Family Dollar steadfastly refused to provide even the name of the informant. Family Dollar claimed this information was privileged, though the law provides no such privilege. Family Dollar elected not to provide testimony from Christopher Splinter, whose testimony was critical to the issue of whether there had been a falsification on the workplace injury report. Family Dollar elected not to provide testimony from Scott Hall—the only person, it appears, who spoke directly with the informant. Family Dollar elected not to provide a copy of the informant's statement for the administrative law judge's examination. Family Dollar elected to withhold the larger part of the workplace injury report and submitted but one page of a multi-page document as Exhibit One. Finally, Family Dollar elected to withhold its "internal investigation" into Mr. Riordan's injury. The administrative law judge cannot assume the veracity of individuals who did not testify. Nor can the administrative law judge overlook the employer's interest in limiting its liability with regard to workers injured on the job.

Family Dollar has failed to meet its burden of proving that Mr. Riordan engaged in misconduct. No disqualification may be imposed.

DECISION:

The decision of the representative dated August 30, 2004, reference 02, is affirmed. The claimant is eligible to receive unemployment insurance benefits, provided the claimant meets all other eligibility requirements.

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