

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

RALPH R JOHNSON JR  
3910 – 34<sup>TH</sup>  
DES MOINES IA 50310

DILLARD DEPARTMENT STORES INC  
ATTN: MS BILLIE TREAT  
1600 CANTRELL RD  
LITTLE ROCK AR 72201-1110

Appeal Number: 05A-UI-11614-DT  
OC: 05/01/05 R: 02  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge  
871 IAC 26.14(7) – Late Call  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Dillard Department Stores, Inc. (employer) appealed a representative's October 31, 2005 decision (reference 03) that concluded Ralph R. Johnson, Jr. (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on December 1, 2005. The claimant received the hearing notice and responded by calling the Appeals Section on November 17, 2005. He indicated that he would be available at the scheduled time for the hearing at telephone number 515-274-1565. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant

was not available. Therefore, the claimant did not participate in the hearing. David Markoff appeared on the employer's behalf. The record was closed at 9:57 a.m. At 11:34 a.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

#### ISSUES:

Should the hearing record be reopened?

Was the claimant discharged for work-connected misconduct?

#### FINDINGS OF FACT:

The claimant received the hearing notice prior to the December 1, 2005 hearing. The instructions inform the parties that they are to be available at the scheduled day and time for the hearing, and if the party is not available, the administrative law judge may proceed and make a decision on other available information. The claimant did not recontact the Appeals Section to seek to participate in the hearing until two hours after the scheduled start time for the hearing. The claimant had forgotten about the hearing, mistakenly remembering it as being set for December 5, 2005, and had gone about other business.

The claimant started working for the employer on August 16, 2005. He worked full time as a sales associate at the employer's West Des Moines, Iowa store. His last day of work was September 29, 2005. The employer discharged him on that date. The stated reason for the discharge was failing to follow instructions and leaving the building without permission.

On September 29, Mr. Markoff, the store manager, walked past where the claimant was working in the shoe department and saw the claimant at the sales counter with a customer and between 50 and 70 boxes of shoes. Mr. Markoff asked what was going on, and the claimant responded that he was selling all of the shoes to the customer for \$19.99 a pair. The shoes were valued at approximately \$40.00 and up; the customer intended to take the shoes and resell them on the Internet. Mr. Markoff asked why the claimant had marked down the shoes. The claimant responded that he thought he could do so as Mr. Markoff had selected several other shoes a few days earlier and had directed that they be marked down to \$19.99. Mr. Markoff replied that those prior shoes had been marked down for a specific reason, and that the claimant did not have the authority to decide on his own to mark down shoes. He instructed the claimant to cancel the sale and refund the customer's money.

After canceling the sale, the customer discovered that the claimant had refunded him less than he had paid; the claimant then took the customer up to customer service to have customer service straighten out the transaction. Mr. Markoff came by the customer service desk at this time to get his coat for lunch and saw the claimant and the customer. He again asked what was going on, and the claimant explained he was going to have customer service straighten out the transaction. Mr. Markoff told the claimant to fix himself what he had messed up. Mr. Markoff then left for the lunch hour.

Rather than proceeding to take care of straightening out the customer's refund himself as instructed, the claimant left the customer at customer service and left the store premises himself. He returned about the time that Mr. Markoff returned from lunch. An assistant store manager informed Mr. Markoff that the claimant had left without taking care of the customer. Mr. Markoff spoke to the claimant and told him he was discharged.

The claimant established a claim for unemployment insurance benefits effective May 1, 2005. He filed an additional claim effective October 2, 2005. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,240.00.

#### REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

Although the claimant intended to participate in the hearing, he failed to read or follow the hearing notice instructions and was not available at the specified time for the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7). The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

The substantive issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code §96.5-2-a.

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).

The claimant's leaving the store and failing to resolve the situation with the customer as directed shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's October 31, 2005 decision (reference 03) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of September 29, 2005. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,240.00.

ld/s