

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE A LEIN
Claimant

APPEAL NO: 15A-UI-06631-LD

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC / DOLLAR GENERAL
Employer

OC: 05/17/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 24.10 – Employer Participation
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Dolgencorp L.L.C. / Dollar General (employer) appealed a representative’s June 1, 2015, decision (reference 01) that concluded Julie A. Lein (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, an in-person hearing was held on August 10, 2015. A review of the Appeals Bureau’s records indicates that the hearing notice mailed to the claimant’s last known address of record was returned by the postal service with an indication the claimant had moved and there was no forwarding address; she therefore did not participate in the hearing. Christie Burkhart appeared on the employer’s behalf and presented testimony from one other witness, Paul VanDerSee. 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:

Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview? Is the employer’s account subject to charge?

OUTCOME:

Affirmed. Benefits allowed. Employer not subject to charge in current benefit year.

FINDINGS OF FACT:

The claimant started working for the employer on April 18, 2015. She worked part time (about 24 hours per week) as a lead sales associate in the employer’s Des Moines, Iowa store. Her last day of work was May 14, 2015. The employer discharged her on that date. The reason

asserted for the discharge was failing to secure company assets by failing to close the safe before leaving the store at the end of the day on May 9.

The claimant and another employee were responsible for closing up the store at the end of business on May 9, but the claimant was the ranking employee. The two employees left the store at about 10:30 p.m., but neither of them closed the under counter safe. The store manager, VanDerSee, discovered the open safe when he opened the store on May 10. Although no funds were actually missing, the employer discharged the claimant because the amount of funds exposed to potential loss was over \$50.00. The employer's policies generally provide that a failure to secure funds can result in discipline "up to and including discharge," but it is the employer's practice to always discharge a ranking employee who fails to close or lock a safe. The employer did not establish that the claimant was aware of that practice. She had not been issued any other disciplinary actions during her employment.

The claimant established an unemployment insurance benefit year effective May 17, 2015. A fact-finding interview was scheduled and conducted on May 29, 2015 at 9:05 a.m. The employer has a third-party representative who was notified in advance of the scheduled interview, and which provided the name and number of Burkhart to participate in the interview, but when the Agency representative called the number provided, Burkhart was not available, because the third party representative had not informed her of the day and time of the interview, and no one participated in the fact-finding interview on behalf of the employer. The claimant received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is her failure to ensure the safe was closed and locked at the end of business on May 9. The employer has not established that this incident, which did not result in any actual loss of assets, was substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, or a good faith error in judgment or discretion. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The employer indicated that it learned additional information on other issues after the discharge, but it is clear that those concerns arose subsequent to the decision to discharge the claimant and were not the basis of the employer's decision to discharge the claimant; those concerns cannot now be used to establish misconduct. *Larson v. Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

Even had the discharge been found to be for misconduct, the employer failed to participate in the fact-finding interview, so any overpayment would not have been subject to recovery. Code § 96.3-7-a, -b; Rule 871 IAC 24.10. The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2014 and ended December 31, 2014. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's June 1, 2015, decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/mak