

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY DAVIS
Claimant

APPEAL NO: 08A-UI-05134-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA INC
Employer

OC: 04-06-08 R: 03
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 20, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 15, 2008. The claimant participated in the hearing. Carmen Bell, Manager; Angie Jackson, Manager; and Dorothy Evans, Assistant Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as part-time cashier for Family Dollar Stores of Iowa from January 12, 2007 to January 2, 2008. On December 31, 2007, the claimant and her husband went to the store to buy a snow shovel but the store was sold out. The claimant then asked if they could buy the one the store used to remove snow and was told it was not for sale. She and her husband left and Assistant Manager Dorothy Evans saw the claimant's husband come back in the store, grab the shovel from behind an advertising sign poster board and leave the store through the entrance door. She reported the situation to the store manager who watched the videotape and saw the claimant's husband take the shovel. Patrons cannot exit through the entrance door unless someone holds that door open for them. The claimant testified her husband removed the shovel from the store and did not bring the shovel to the car but placed it behind the outside pop machine as a joke. The employer found the shovel two to three days later but did not believe it had been there since it was discovered missing December 31, 2007. People in the neighborhood had stolen a coffee can for cigarette butts and dumped 50 pounds of sand out of an outside broken planter and taken the planter. The shovel was fluorescent orange and the employer believed it would have been noticed by employees or stolen if left out for two to three days. After interviewing the witness and viewing the videotape the employer terminated the claimant's employment.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While it is not clear whether the claimant and her husband took the employer's shovel or if her husband took it while she held the entrance door open so he could exit without going through the store, the preponderance of the evidence establishes that the claimant was involved and her actions contributed to depriving the employer of its property. It seems unlikely that they placed the shovel behind the pop machine without it being stolen because of the high number of thefts the store experienced when it left inconsequential items outside and the florescent orange color of the shovel would have drawn attention and made it improbable that the employer would not have seen the shovel. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its

burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

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 May 20, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,904.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs