

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARNOLD L SHOLL
Claimant

APPEAL NO. 07A-UI-10700-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP INC
DOLLAR GENERAL
Employer

OC: 09/30/07 R: 04
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

DolGenCorp, Inc. / Dollar General (employer) appealed a representative's November 2, 2007 decision (reference 01) that concluded Arnold L. Sholl (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 5, 2007. The claimant participated in the hearing. Diane French appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 20, 2005. He worked part time (about 25 hours per week) as an associate in the employer's Fort Madison, Iowa store. His last day of work was September 27, 2007. The employer suspended him on that date and discharged him on October 10, 2007. The reason asserted for the discharge was of a conviction that came up in a background check.

On September 24, while off duty, the claimant's girlfriend broke up with him. He went to her house and rang the door bell and knocked, attempting to talk with her. He then called her on the phone and was trying to persuade her not to break up. She filed a complaint with law enforcement and the claimant was charged with simple misdemeanor trespassing and harassment. On the morning of September 27, he went to court and pled guilty to the charges and paid the applicable fines. He went to work as scheduled that afternoon and worked his regular shift. While he was there, the employer's district manager called him in to the office and asked what had happened; the claimant explained the events as set forth above. At the end of the day, the store manager told the claimant that the district manager had instructed that the claimant be suspended pending a background check.

On October 10 the store manager told the claimant that she had been instructed to discharge him because of not passing the background check. The claimant testified, and the employer had no

evidence to the contrary, that the only matter that would have been reflected on the criminal background check was the simple misdemeanor convictions for the events of September 24. The employer provided no evidence of any policy that would apply to the claimant's conduct on September 24 or under which the September 27 simple misdemeanor convictions would render him in violation.

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).

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.

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his simple misdemeanor convictions for his off duty conduct on September 24, 2007. Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work connected." Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off duty conduct can have the requisite element of work connection." Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

In order for an employer to show that is employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

[T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); In re Kotrba, 418 N.W.2d 313 (SD 1988), quoting Nelson v. Department of Employment Security, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77-78.

The employer has not satisfied any of the factors of this test; therefore, 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.

DECISION:

The representative's November 2, 2007 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 he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw