

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SUSAN M DAHL**  
Claimant

**APPEAL NO. 06A-UI-06525-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOLDEN EAGLE DISTRIBUTING CO INC**  
Employer

**OC: 10/12/03 R: 02  
Claimant: Appellant (1)**

Section 96.5-2-b – Discharge for Gross Misconduct

**STATEMENT OF THE CASE:**

The claimant appealed an unemployment insurance decision dated June 9, 2006, reference 01, that concluded she was discharged for gross misconduct. A telephone hearing was held on October 2, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing. Richard Gaumer, Attorney at Law, participated in the hearing on behalf of the employer with witnesses, Chrissy Riesenback, Pat Werhl, Shelly Jones, and Dee Schroeder. Exhibit One was admitted into evidence at the hearing.

Official notice is taken of the past decisions regarding the claimant's unemployment insurance claim, which show: (1) in a decision dated November 3, 2003, the claimant was determined discharged for work-connected misconduct; (2) after a contested case hearing on December 18, 2003, an administrative law judge affirmed the disqualification in a decision dated January 5, 2004, (3) the Employment Appeal Board reversed the decision of the administrative law judge and ruled the claimant's discharge was not for work-connected misconduct in a decision dated February 27, 2004; and (4) District Court Judge E. Richard Meadows, Jr., affirmed the findings of fact and conclusions of law of the Employment Appeal Board in a decision dated October 11, 2004. No appeal was taken from the District Court Judge's decision. If a party objects to taking official notice of these decisions, the objection must be submitted in writing no later than seven days after the date of this decision. Based on the evidence, the arguments of the parties, and the law, the following findings of fact, reasoning and conclusions of law, and decision are entered.

**ISSUES:**

Are the claimant's wage credits canceled because she lost her employment due to gross misconduct?

Can a deferred judgment be used in determining that the claimant was discharged for gross misconduct?

## **FINDINGS OF FACT:**

The claimant worked for the employer as a data technician from May 20, 1998, to October 9, 2003. The employer discharged the claimant on October 9, 2003, because Jeff Lee, the general manager of operations, was taking money from the employer for his personal use and the claimant knowingly changed sales information on sales invoices at Lee's direction to offset money Lee was stealing from escrow bags. The claimant's conduct aided Lee in taking the money and concealed his theft.

After the claimant was discharged, she was arrested and charged with the felony of first degree theft based on the conduct that led to her discharge. In April 2006, she entered a plea of guilty to the offense of being an accessory after the fact to the felony offense committed by Lee in taking money from the employer. The first degree theft charge was dismissed. The Court later entered a deferred judgment under which no conviction will be entered if the claimant successfully completes the terms of her probation. There is no evidence that the claimant's probation has been revoked. There is no evidence the claimant signed any written statement admitting the commission of an act constituting an indictable offense.

The claimant filed a new claim for unemployment insurance benefits with an effective date of October 12, 2003, based on wages paid by the employer.

## **REASONING AND CONCLUSIONS OF LAW:**

The general issue to be decided is whether the claimant was discharged for gross misconduct. Iowa Code § 96.5-2 provides that 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 been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
- b. If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.
- c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

Did the claimant lose her employment as a result of an act constituting an indictable offense in connection with her employment? Although the evidence provided by both parties was surprisingly vague on this point, the preponderance of the evidence establishes the claimant entered a plea of guilty to accessory after the fact to the felony committed by Jeff Lee. Under Iowa Code § 703.3, an accessory after the fact to a felony is guilty of an aggravated misdemeanor, which is an indictable offense according to Iowa Code § 801.4-8.

The claimant, however, argues she pled guilty to not reporting Lee's actions in taking money, but her discharge was for "fixing tickets" at the request of Lee. Unquestionably, a claimant discharged for one reason later convicted of a crime that is unrelated to reason for the

discharge is not subject to a gross misconduct disqualification. For example, a claimant discharged for excessive absenteeism who the employer later discovers has stolen money while she was employed does not meet requirements of the gross misconduct disqualification.

The claimant, however, was not discharged for unrelated conduct, she was discharged for her conduct that assisted and concealed Lee's misappropriating money from the employer. Legally, she entered a plea of guilty to being an "accessory after the fact" which under Iowa Code § 703.3 is defined: "Any person having knowledge that a public offense has been committed and that a certain person committed it ... who harbors, aids or conceals the person who committed the offense, with the intent to prevent the apprehension of the person who committed the offense, commits an aggravated misdemeanor if the public offense committed was a felony." The claimant admitted that she knowingly fixing tickets, which aided Lee in taking money and concealed his actions so they would not be discovered. The acts for which the claimant was discharged and the offense to which she pleaded guilty involve the same conduct.

The next issue is whether the claimant was "duly convicted" of being an accessory after the fact since she received a deferred judgment. The Iowa case law in this area is not straightforward, and deferred judgments have been treated as convictions for some purposes and not for others. It is necessary to review the case law in order to make a proper judgment in this case.

The leading case on this issue is State v. Kluesner, 389 N.W.2d 370 (Iowa 1986). The Iowa Supreme Court acknowledged the difficulty with the legislature's use of the word "conviction" because the word may have different meanings in different contexts. Id. at 372. The court reasoned that in the "restricted or technical legal sense the word" conviction "means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt," but in "its general and popular sense and frequently in its ordinary legal sense, the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty." Id.

This distinction is important in determining whether a deferred judgment is a conviction, because technically, a deferred judgment is "a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court." Iowa Code § 907.1-1. The elements of a judgment in a criminal case include both an adjudication of guilt and imposition of sentence, but when judgment is deferred, there is neither an adjudication of guilt nor an imposition of sentence. State v. Farmer, 234 N.W.2d 89, 91-92 (Iowa 1975).

The court in Kluesner concluded the purpose of the statute controls the determination of which meaning—technical or popular—the legislature had in mind. The court stated: "While we have construed the word 'conviction' to have a relatively narrow and technical meaning where it appears in statutes used to enhance punishment, we have accepted a broader definition when protection of the public has been at stake." Kluesner, 389 N.W.2d at 372. The court ruled the restitution statute's purpose was to protect the public by compensating victims of criminal activities and, therefore, the word conviction should be given a broad meaning to include an order for deferred judgment. Id. See also State v. Ridout, 346 N.W.2d 839-40 (Iowa 1984) (deferred judgment not included within definition of offense under statute prescribing enhanced punishment for second, third or subsequent OWI offense); Schilling v. Iowa Department of Transportation, 646 N.W.2d 69 (Iowa 2002) (deferred judgment for eluding a police officer may be used for revocation of driving privileges because revocation is not intended as a punishment to the driver but for the protection of the public in the use of the highways).

The case law establishes the purpose of the statute as the deciding factor for whether a deferred judgment will be treated as a conviction, but the cases unfortunately suggest every statute falls into one of two purpose categories—statutes used to enhance punishment or to protect the public. On the surface level, the gross misconduct statute at issue in this case appears to be a punishment-enhancement statute because an ordinary misconduct disqualification lasts until a claimant earns wages of at least ten times her weekly benefit amount while the gross misconduct completely cancels a claimant's wage credits, which requires establishing a whole new base period of wages meeting the requirements of Iowa Code § 96.4-4. In addition, the statute does not appear to have a purpose of protecting the public. On the other hand, the principles of statutory construction advise that all parts of a statute are to be considered together without giving undue importance to a single or isolated part. The language used in the statute and the purpose for which it was enacted must be examined. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981).

Using these principles, Iowa Code § 96.5-2 provides two methods to establish a gross misconduct disqualification—conviction or signing a statement admitting the commission of an indictable offense. The revealed statutory purpose then is to impose a gross misconduct disqualification when a claimant is discharged for act determined to be a serious crime provided there is objective proof of commission of the crime. The fact that the statute imposes a gross misconduct disqualification when a claimant merely signs a statement admitting to an indictable crime shows that “duly convicted” is to have broader than its technical meaning. It would include the claimant's deferred judgment after her plea of guilty to the indictable offense of accessory after the fact. Viewed in this fashion, the gross misconduct statute is not a punishment-enhancement statute but instead is separate disqualification with different elements.

Finally, I recognize the incongruity of imposing a gross misconduct disqualification when the Employment Appeal Board and District Court—after examining the same conduct—decided no ordinary misconduct was proven. I further acknowledge the decision of the District Court became final when the employer failed to appeal the decision with the statutory timeframe, yet the gross misconduct disqualification seems to override that decision. In theory, the prior case could have continued up to the Iowa Supreme Court with an affirmance of the award of benefits to the claimant. I mention this to emphasize the impact of the gross misconduct statute which would, even in this hypothetical case, require the claimant to be subject to the gross misconduct disqualification. One could imagine other cases in which a claimant is discharged for committing an indictable offense involving in essence strict liability. A claimant in such a case might not meet the culpability standard set forth in 871 IAC 24.32(1) for an ordinary misconduct disqualification yet would meet the conditions for gross misconduct under Iowa Code § 96.5-2-c. To carry out the legislative will expressed in the law, the cancellation of wage credits would have to be imposed in such a case. Likewise in this case, the evidence establishes the conditions required for a gross misconduct disqualification under Iowa Code § 96.5-2-c.

**DECISION:**

The unemployment insurance decision dated June 9, 2006, reference 01, is affirmed. The claimant's wage credits earned prior to her separation from employment are canceled, and she is ineligible for benefits effective October 12, 2003.

---

Steven A. Wise  
Administrative Law Judge

---

Decision Dated and Mailed

saw/cs