

**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**

**JENNIFER E JOHNSON
215 E BLUFF
CARROLL IA 51401**

**DOLGENCORP INC
D/B/A DOLLAR GENERAL
C/O COMPENSATION TAX MANAGEMENT
CORPORATION
PO BOX 34150
LOUISVILLE KY 40232-4150**

**Appeal Number: 04A-UI-05746-RT
OC: 04-25-04 R: 01
Claimant: Respondent (1)**

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Dolgencorp, Inc., doing business as Dollar General, filed a timely appeal from an unemployment insurance decision dated May 12, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Jennifer E. Johnson. After due notice was issued, a telephone hearing was held on June 16, 2004, with the claimant participating. Teresa Hamilton, Store Manager at a store in Denison, Iowa, a different store from where the claimant worked, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time lead clerk from November 3, 2003 until she was discharged on April 19, 2004. The claimant was discharged for allegedly stealing merchandise, inasmuch as she took a couple of soft drinks or pops without paying the employer. The claimant was employed at the employer's store in Carroll, Iowa. During an investigation of another employee for theft of merchandise, the claimant was interviewed on or about April 2, 2004. At that interview the claimant said that she may have forgotten to pay for a couple of soft drinks or pops. The claimant stated that she was not involved with this other employee engaged in the theft and the employer does not suggest that the claimant was and has no evidence therefore. Because the claimant conceded that she "may have forgotten" to pay for a couple of soft drinks, a written statement was prepared to that effect and signed by the claimant on or about April 6, 2004. The claimant was then discharged almost two weeks later, on April 19, 2004. There were no other reasons for the claimant's discharge. The claimant received no warnings or disciplines for this behavior. The employer discharged two other employees, including the employee who was the initial subject of the investigation, and believed that it needed to also discharge the claimant because of her statement. The employer had no independent evidence that the claimant took any soft drinks or pop without paying the employer. The claimant testified that she did not believe that she had ever done so, but conceded that she may have forgotten on an occasion. The employer has a rule in its handbook that provides that stealing merchandise is grounds for a discharge. Pursuant to her claim for unemployment insurance benefits filed effective April 25, 2004, the claimant has received unemployment insurance benefits in the amount of \$354.00 as follows: \$59.00 per week for six weeks, from benefit week ending May 1, 2004 to benefit week ending June 5, 2004. For benefit week ending June 12, 2004 the claimant reported earnings sufficient to nullify benefits. For benefit week ending June 19, 2004, the claimant is shown as being disqualified for other reasons, which appears to be because she did not report as directed for profiling at reference 03.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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, (8) provide:

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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.2(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Teresa Hamilton, Store Manager for a store in Denison, Iowa, a different store from where the claimant worked, testified that the claimant was discharged because she stated that she may have forgotten to pay for a couple of soft drinks. This arose during an investigation of another employee for stealing merchandise. The claimant knew nothing about that and was not discharged for that, nor is there any suggestion by the employer that the claimant participated or collaborated in that theft. However, during the claimant's interview in regards to that theft, the claimant stated that she may have forgotten on occasion to pay for a soft drink. The claimant credibly testified that she did not believe that she had ever failed to pay for a soft drink or pop, but conceded that it was possible. The claimant signed a written statement to that effect, stating that she "may have forgotten" to pay for a soft drink. The employer had no independent or other evidence that the claimant had ever consumed or taken a soft drink without paying for it. Although the claimant was interviewed on April 2, 2004, and signed the written statement on April 6, 2004, she was not discharged until April 19, 2004. Ms. Hamilton testified that she thought the delay was so that additional investigation could be conducted and that the employer could get everything right. The administrative law judge is not convinced that this is the reason for the delay in the

claimant's discharge. Ms. Hamilton testified that two other employees were discharged for the theft of the merchandise, and the employer felt that to be consistent, it needed to discharge the claimant for the possibility that she had taken an occasional soft drink.

On the evidence here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant ever took any soft drinks from the employer for which she did not pay, nor did she take any other merchandise. The claimant credibly testified that she did not believe that she had ever taken a soft drink without paying for it, but conceded that she may have but forgotten to pay for it. The claimant signed a statement to this effect. The administrative law judge concludes that the claimant was attempting to be as truthful as possible during the interview stage and the statement, but that there is no evidence that the claimant ever deliberately or willfully took soft drinks without paying for them. The claimant never received any warnings or disciplines. The administrative law judge concludes that there is not a preponderance of the evidence that claimant's behavior was even carelessness or negligence in such a degree of recurrence as to be disqualifying misconduct. At the very most, there is only evidence here of ordinary negligence in an isolated instance when the claimant "may" have forgotten to pay for a soft drink. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

The administrative law judge further notes that there was almost a two week delay between the claimant's discharge and the date of the statement that the claimant signed indicating that she "may have forgotten" to pay for a soft drink. The administrative law judge further notes that a discharge for misconduct cannot be based on past acts, and it appears here that the claimant's discharge may well have been based on past acts. There was no evidence of warnings or disciplines or other past acts or similar violations.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$354.00 since separating from the employer herein on or about April 19, 2004 and filing for such benefits effective April 25, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated May 12, 2004, reference 01, is affirmed. The claimant, Jennifer E. Johnson, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

b/b