

**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**

**CATHERINE A LONG
2715 AVE A
COUNCIL BLUFFS IA 51501**

**DILLARD DEPARTMENT STORES INC
ATTN MS BILLIE TREAT
1600 CANTRELL RD
LITTLE ROCK AR 72201-1110**

**Appeal Number: 06A-UI-04089-DT
OC: 03/05/06 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

STATEMENT OF THE CASE:

Dillard Department Stores, Inc. (employer) appealed a representative's March 29, 2006 decision (reference 02) that concluded Catherine A. Long (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 May 1, 2006. The claimant participated in the hearing. Wendell Moore appeared on the employer's behalf and presented testimony from one other witness, Robin McMillen. During the hearing, Employer's Exhibit One was entered into evidence. 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 May 16, 2005. She worked full time as a sales associate at the employer's Council Bluffs, Iowa store. Her last day of work was March 9, 2006. The employer discharged her on that date. The reason asserted for the discharge was falsification of her job application with a suspicion of complicity in a theft incident.

On February 27, 2006, two adult males and one adult female entered the store and began shopping, collecting goods as they separately went around the store. They separately declined offers of assistance to ring up the sales by other associates. They converged at the claimant's check out in the women's department. One of the men started having the claimant ring up his items from the men's department. When the claimant had rung up 18 items, that man and the woman began having an argument about the woman not having enough of a balance on her store credit card to cover the items; as a result, the claimant voided all of the items. She set the bag into which she had already placed the man's items on the floor beside her, and placed the void slip on the counter while she processed the five or six items woman wanted to purchase with a store credit card. The second man also intervened at this point to buy a water bottle. After the party had left, the claimant realized that the bag of men's items was gone, as was the void slip.

Later in the week, the employer received a report that the credit card used in the transaction had been reported as stolen. The claimant cooperated with the police investigation and was able to identify at least some pictures of the "customers" from photo lineups. On or about March 4, 2006, Mr. Moore, the assistant store manager, ran an Internet search on the claimant and found what appeared to be a criminal conviction for fifth degree theft from September 24, 1996 on the claimant's record. The claimant acknowledged that she has a criminal conviction for driving while barred, but denied that the theft conviction was hers; she asserted that in doing a check of her criminal record through her attorney for purposes of seeking a work permit, they have found some criminal records in her court file that are for a different person other than the claimant.

The job application had asked for information on convictions other than traffic violations; the claimant had answered "no." Ms. McMillen, the store manager, stated that assuming the theft conviction had been the claimant's, had she reported the conviction on her application it would not have barred her from being hired; it only resulted in the discharge because of the coincidence with the employer's suspicions regarding the February 27, 2006 incident.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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 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 her alleged failure to report a prior criminal conviction plus its suspicions regarding the claimant's potential involvement with the February 27, 2006 transaction. First, the employer has not established by a preponderance of the evidence that the criminal conviction from September 1996 was in fact for the claimant, and the claimant denies that it is hers. Further, the employer has not established by a preponderance of the evidence that the claimant had any fraudulent involvement in the February 27, 2006 transaction, and the claimant denies that her involvement was anything more than mistakenly allowing herself to be distracted enough by the commotion to allow the "customers" to remove the product and receipt.

Finally, even if the conviction actually had been the claimant's, without establishing an actual illicit involvement in the "customers" transaction, a failure by the claimant to disclose the conviction on the application alone would not establish disqualifying misconduct. The false statement or omission on the application must endanger the health, safety or morals of the applicant or others or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. The Iowa supreme court has ruled that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). Although the court did not define materiality, it cited Independent School District v. Hanson, 412 N.W.2d 320 (Minn. App. 1987), stating that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. Here, the claimant still would have been hired. Therefore, the administrative law judge concludes that the claimant's alleged but unproven act of falsification on her application was not misconduct and, as a consequence, she is not disqualified for unemployment insurance benefits on that account.

Under the circumstances of this case, the claimant's allowing the "customers" scam maneuvers to distract her to the point of enabling their theft was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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 March 29, 2006 decision (reference 02) 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.

ld/tjc