

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VIRGINIA FERDIG
Claimant

APPEAL NO. 11A-UI-11212-WT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLLAR GENERAL
Employer

**OC: 7/17/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated August 17, 2011, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on September 16, 2011. Claimant participated personally. Employer failed to respond to the hearing notice and did not participate.

ISSUES:

The first issue is whether the claimant quit or was discharged.

If the claimant was discharged, the issue is whether claimant was discharged for misconduct.

If the claimant quit, the issue is whether the claimant quit with good cause attributable to the employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds as follows. Claimant began working for the employer in May 2010. She was a part-time cashier. Ms. Ferdig became frustrated with the store manager, Robert, because of comments he made to her and other employees. She e-mailed Dollar General Human Resources on July 1, 2011, and complained about Robert. She received a telephone call from the District Manager, Dave, on July 2, 2011. She soon learned that her call to human resources was not confidential and that Robert was notified of her report. She failed to call in or show up for work on July 1, or July 2, 2011 because she was uncomfortable. Ms. Ferdig had conversations with another manager, Stacie, the assistant manager on July 2.

Claimant was scheduled off work on July 4 and 5. She was scheduled to work on July 6. She called Robert on July 6. Initially her calls did not get through. Once she blocked her calls, Robert answered. She asked if she was allowed to return to work and he told her she would have to talk to Dave, the district manager. Claimant attempted to call Dave and did not get through. At this point, the claimant gave up.

REASONING AND CONCLUSIONS OF LAW:

The initial question raised in this case is the nature of the separation. Separations are categorized into four separate categories under Iowa law.

24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

See Iowa Administrative Code 871—24.1.

It is the employer's burden to prove that the claimant quit. Since the employer did not participate in the hearing, the only evidence available is the testimony of the claimant. The claimant is found to be credible. Ms. Ferdig testified that she felt her work environment had become unbearable in June of 2011 because the store manager, Robert continually made disrespectful comments. On July 1, 2011, Ms. Ferdig contacted human resources at Dollar General and filed a complaint about her manager, Robert. Ms. Ferdig did not call in or report to work on July 2, 2011, although she did speak to her assistant manager, who knew what had transpired.

It is found that Ms. Ferdig did not quit or intend to quit. She was clearly confused about what she should do to protect her job. She understood that if she failed to show up for work three days in a row, she would be terminated. She spoke to Robert on July 6. The best evidence in the record is that Robert refused to allow her to return to work on July 6. This is best characterized as an employer initiated separation, and consequently must be viewed as a discharge. Since it is a discharge, the issue of misconduct must be addressed.

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.

871 IAC 24.32(8) provides:

(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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct. By her own admission, the claimant did fail to report to work without proper reporting for two days in a row although she had contacted the assistant manager. She had just reported the store manager to the corporate office for various allegations involving poor management. She was confused about how she should proceed to protect her job. She was given little or no guidance about what she should do. There is simply not enough evidence in the record to establish a finding of misconduct.

DECISION:

The fact-finding decision dated August 17, 2011, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/css