

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA M WARNKE

Claimant

APPEAL NO: 15A-UI-02170-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA INC

Employer

OC: 05/11/14

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 3, 2015, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 23, 2015. The claimant participated in the hearing. The employer provided a phone number where she could be reached prior to the hearing. However, when called for the hearing, the employer's witness was not available for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer's witness then called at 9:55 a.m. for the 8:00 a.m. hearing and stated she forgot about the hearing. Department's Exhibit D-1 was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's last-known address of record on February 3, 2015. The claimant never received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 13, 2015. The appeal was not filed until February 17, 2015; which is after the date noticed on the disqualification decision. Because the claimant never received the decision and was unaware of it until she went to the Waterloo office regarding another issue and was notified of the disqualification decision at that time and filed an appeal that day, the administrative law judge concludes the claimant's appeal is timely.

The claimant was employed as a full-time assistant manager for Family Dollar from September 23, 2011 to January 17, 2015. The employer stopped giving her hours and then told her she no longer had a job January 17, 2015.

In December 2014, the district manager approached the claimant and asked her if she was willing to become the acting store manager because Store Manager Sabrina Grell was not performing her job to the employer's expectations and the employer wanted to retrain her. The claimant agreed to act in that role for the employer. Ms. Grell found out about the district manager's decision from another assistant manager who overheard the district manager's conversation with the claimant. The claimant learned Ms. Grell was aware of the situation through Facebook when Ms. Grell and the assistant manager started posting comments about the claimant's character on Facebook and said she was trying to take Ms. Grell's job. This situation began the week of December 22, 2014.

After Ms. Grell learned what was going on she began cutting the claimant's full-time hours and transferring her between the two stores in Waterloo. The only time she was receiving any hours from her original store was when the employer randomly called her to work when an employee failed to show up. The schedules were posted on Saturdays for the following week but the claimant was not receiving any hours from Ms. Grell. She asked Ms. Grell why she was not receiving any hours and was told she worked at the other store. The claimant called the manager at the other store for her hours and was told she did not work there. The claimant worked some hours over Christmas but then was not scheduled again until January 10, 2015. She asked Ms. Grell what was going on and was told she had transferred to the other store. The claimant tried to call, text, and email the district manager approximately 15 times between December 22, 2014 and January 16, 2015 but she never received a response. The claimant called Ms. Grell on January 17, 2015 to ask if she had any hours and Ms. Grell stated she did not because the claimant no longer worked for the employer. The claimant asked why her employment was being terminated and Ms. Grell stated she was being let go for not coming to work. The claimant had not received any verbal or written warnings during the last year for attendance or tardiness.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

Ms. Grell learned the district manager asked the claimant to work as the acting store manager while the employer retrained Ms. Grell and following the receipt of that information Ms. Grell not only made disparaging comments about the claimant on Facebook but also said she had been transferred to the other store and effectively stopped scheduling the claimant after yanking her around between the two stores. After the claimant asked about Ms. Grell's failure to schedule her over the period of several weeks, Ms. Grell initially told the claimant she had been transferred and later stated her employment had been terminated for attendance reasons. The claimant credibly denies any unexcused absences.

The claimant did not do anything wrong but rather was punished by Ms. Grell because she agreed to help the employer by working as the acting store manager and Ms. Grell expressed her feelings about that situation by denying the claimant hours and treating her inappropriately and unprofessionally by sending her bouncing between both stores while each refused to provide her any hours. Additionally, the district manager's actions in failing to respond to the claimant's repeated attempts to contact her about Ms. Grell's behavior were unacceptable and frankly cowardly as it was her request of the claimant to take over as acting manager that set the entire situation in motion.

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing and failed to provide any evidence. The evidence provided by the claimant does not establish disqualifying job misconduct as that term is defined by Iowa law. The employer has not met its burden of proof. Therefore, benefits are allowed.

DECISION:

The February 3, 2015, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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