

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLAMINA J WILSON
Claimant

APPEAL NO. 08A-UI-10874-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP INC
Employer

**OC: 10-12-08 R: 02
Claimant: Appellant (1)**

Iowa Code 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 November 4, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 4, 2008. The claimant did participate. The employer did participate through Mike Hutchinson, District Manager. Department's Exhibit D-1 was received.

ISSUES:

Did the claimant file a timely appeal?

Was the claimant discharged for work related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a sales associate/cashier part time beginning August 6, 2008 through October 14, 2008 when she was discharged.

The claimant was out of town from November 9, 2008 through November 17, 2008. She did not receive the decision until after the time for an appeal had expired. She filed her appeal on November 18, 2008 the day after she received it.

The claimant was observed by the district manager and the asset protection coordinator to take a package of gum off the shelf and begin to chew it without paying for it. The claimant admitted that on October 14, 2008 that she took a package of gum off the shelf and began to chew it prior to paying for it. After the claimant was told she was discharged, she paid for the gum.

On October 14 the employer reviewed surveillance video tape of the claimant and also discovered that earlier in the week she had taken a package of potato chips off the shelf and eaten them without paying for them. The employer's surveillance tape records all activity at all cash registers and the claimant never paid for the potato chips during or after completing her work shift and leaving the premises.

The claimant received the employer's handbook which prohibits employees from taking product from the stores and eating it prior to paying for it.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received until after the time for an appeal had expired. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant appealed the decision one day after her receipt of it. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 claimant knew or should have known that taking product from the store without paying for it was conduct prohibited by the employer's handbook and was conduct not in the employer's best interests. While the claimant alleges that the practice of taking product and paying for it later was widespread, no manager or other employee confirmed her allegations either to the employer or at hearing. She was also observed to not pay for a package of potato chips. The claimant's conduct amounts to theft from the employer and is sufficient misconduct to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

DECISION:

The November 4, 2008, reference 01, decision is affirmed. The claimant filed a timely appeal. The claimant was discharged from employment due to job-related misconduct. Benefits are

withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs