

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

MICHELLE L THORMAN
963 SOUTH CONCORD ST
DAVENPORT IA 52802

FAMILY DOLLAR STORES OF IOWA INC
STORE #1424
c/o TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-03375-RT
OC: 02/27/05 R: 04
Claimant: Respondent (2)

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, Family Dollar Stores of Iowa, Inc., Store Number 1424, filed a timely appeal from an unemployment insurance decision dated March 22, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Michelle L. Thorman. After due notice was issued, a telephone hearing was held on April 28, 2005, with the claimant participating. Scott Andrews, District Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits One through Four were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Four, the administrative law judge finds: The claimant was employed by the employer as a full-time assistant manager at Store Number 1879 in Davenport, Iowa, from November 2004 until she was discharged on February 28, 2005. The claimant was discharged for theft of the employer's property. The claimant took three boxes of cereal, which were damaged and unusable merchandise. The employer refers to damaged unusable merchandise as D100's. The employer has a specific rule or policy as shown at Employer's Exhibit Two that provides that no unsellable merchandise may be removed from the store or department by Family Dollar personnel nor may anyone remove it for an associate. The claimant signed the policy and was aware of the policy. The claimant also took two cokes, a shower curtain, a shower rod, Caress soap, and Axe soap without paying for them. These items were not D100's, but were usable undamaged merchandise. Employer's Exhibit One is a list of these items completed by the claimant including the three boxes of cereal. The claimant took the items that were not damaged no later than early January 2005. The claimant has still not paid for the items as of the date of her discharge on February 28, 2005. The claimant signed an agreement agreeing to pay the employer for the cost of the items taken as shown at Employer's Exhibit Three. These matters came to light because the employer was suffering significant inventory shrinkage and talked to all of the employees. The claimant gave her consent to be interviewed by the loss prevention person, Feonn Randall as shown at Employer's Exhibit Four. This interview occurred over the phone. The claimant admitted to taking the items as noted above. The claimant had received no warnings or disciplines for this behavior and there was no other reason for her discharge.

Pursuant to her claim for unemployment insurance benefits filed effective February 27, 2005, the claimant has received unemployment insurance benefits in the amount of \$605.00 for seven weeks from benefit week ending March 5, 2005 to benefit week ending April 16, 2005. For many of these weeks the claimant reported earnings, which had the effect of reducing her unemployment insurance benefits.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

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).

The parties agreed, and the administrative law judge concludes, that the claimant was discharged on February 28, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Scott Andrews, District Manager, credibly testified that the claimant took damaged and unusable merchandise called D100's as well as other items which were not damaged and which were usable without paying for them. Basically, the claimant concedes that she took the items which are shown at Employer's Exhibit One and conceded further that she agreed to pay for the items as shown at Employer's Exhibit Three. However, the claimant claims that she had permission from the manager at the time to take the damaged or unusable items and that, further, the manager permitted the employees to take usable items and make a list and pay for them later. Even assuming that the manager permitted such behavior, the administrative law judge concludes that it is not a defense or justification for the claimant's actions. The claimant testified that she was aware of the employer's policy as shown at Employer's Exhibit Two. The employer's policy is most clear that no unsellable merchandise may be removed from the store or department. The claimant was aware of the policy, but justifies her behavior by stating that the manager permitted it. The administrative law judge does not believe that this justifies what is obviously theft according to the employer's policies. Further, the claimant testified that the manager permitted the employees to take items that were usable and not D100's and pay for them later so long as they made a list. This also is not credible nor is it a defense to taking the items, even if the then manager had approved the process. The claimant testified that she had taken the undamaged usable items in early January and conceded she had still not paid for them on February 28, 2005. The claimant had those items for almost two months without paying the employer. There was no list available of these items that the claimant had signed promising to pay. Claimant said something about it being destroyed but again, this is not credible. These

matters came to light as a result of an investigation after significant shrinkage in the employer's inventory. The claimant signed an interview consent for such investigation. The administrative law judge is constrained to conclude here that the claimant took damaged unusable items from the employer in contravention of the employer's policy of which she was well aware and further took other items from the employer that were usable, but for which she did not pay. The administrative law judge is further constrained to conclude that these acts were deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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 \$605.00 since separating from the employer herein on or about February 28, 2005 and filing for such benefits effective February 27, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision dated March 22, 2005, reference 01, is reversed. The claimant, Michelle L. Thorman, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$605.00.

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