

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LISA A ZIMMERMAN
Claimant

APPEAL NO. 18A-UI-05877-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 04/28/18
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 15, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on April 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on June 14, 2018. Claimant Lisa Zimmerman participated. Julie Lomker represented the employer and presented additional testimony through Angela Buckner. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 7 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether Ms. Zimmerman was overpaid benefits.

Whether Ms. Zimmerman must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lisa Zimmerman was employed by Dolgencorp, L.L.C., d/b/a Dollar General, as a part-time Key Holder from December 2017 until April 30, 2018, when Julie Lomker, Store Manager, discharged her from the employment. At the start of her employment, Ms. Zimmerman trained at the Kalona Dollar General. The employer hired Ms. Zimmerman to work at the Dollar General Store in North English. The North English store opened for business January 12, 2018.

Ms. Zimmerman assisted with preparations to open the store. As a Key Holder, Ms. Zimmerman was third in line in the store hierarchy, behind Store Manager Julie Lomker and the assistant manager. Sonya Weir was initially the Assistant Manager at the North English store. On March 25, 2018, Angela Buckner replaced Ms. Weir as Assistant Manager at the North English store. While Ms. Lomker was at all relevant times Ms. Zimmerman's primary supervisor, the assistant manager had delegated authority to direct Ms. Zimmerman's daily work. The assistant manager and the key holder could each be left in charge of the store in the absence of the store manager. That might include working solo for two or three hours during the shift. Ordinarily, the store would also staff the store with a cashier for most of the shift. Some duties were specific to the opening shift and some were specific to the closing shift. The closing shift duties included cleaning the restrooms, sweeping and mopping floors, "facing" shelves and money handling duties.

The alleged conduct on the part of Ms. Zimmerman that factored in the discharge decision involved Ms. Zimmerman's interaction with Ms. Buckner while Ms. Lomker was at a training conference in April 2018. Ms. Lomker left for the conference on Monday, April 23 and returned on Friday, April 27. Ms. Lomker left Ms. Buckner in charge of the store during her absence. Ms. Buckner remained in contact with Ms. Lomker and documented store issues during Ms. Lomker's absence. During Ms. Lomker's absence, Ms. Zimmerman worked the closing shift.

On Monday, April 23, 2018, Ms. Zimmerman checked in with Ms. Buckner when Ms. Zimmerman arrived in the afternoon to start her closing shift. Ms. Buckner perceived Ms. Zimmerman's tone during that interaction to be "not very nice." Before Ms. Buckner left for the day, she instructed Ms. Zimmerman to complete some markdowns and to "face" the store shelves. To perform the markdowns, Ms. Buckner would need to review the markdown paperwork, pull the designated merchandise from the retail shelf, and mark the merchandise with the designated clearance price stickers. For designated merchandise that could not be readily located, Ms. Zimmerman would need to scan the item's UPC code on the markdown paperwork, use the UPC code to locate the merchandise in the store, and then mark the merchandise with the designated clearance price stickers. Ms. Buckner instructed Ms. Zimmerman to leave the marked down merchandise in a cart behind the counter at the front of the store. Facing the store involved moving product to the front of the retail shelf to make the shelf look more orderly and presentable. Facing the store was a daily duty generally performed by all store staff. Ms. Buckner added to her instructions that if Ms. Zimmerman and the cashier could "do skyselves" as they went along, that would be great. The "skyself" is the top most shelf in the retail aisle where merchandise is stored before it is rotated down to shelves within the customer's reach. Accessing the skyself requires use of a step-ladder. Also on April 23, Ms. Buckner told Ms. Zimmerman that Ms. Buckner needed to break down some empty boxes the following morning unless Ms. Zimmerman wanted to break them down for her. In other words, Ms. Buckner instructed Ms. Zimmerman to perform the markdowns and facing, but merely suggested that Ms. Zimmerman address the skyself and break down empty boxes.

When Ms. Buckner arrived at work on the morning of April 24, she was disappointed to find that Ms. Zimmerman had used the wrong colored price stickers and wrong prices in the course of marking down merchandise. Ms. Zimmerman had used yellow price stickers, rather than orange clearance stickers. Ms. Buckner reviewed store video surveillance, which showed Ms. Zimmerman punching in the UPC code for each designated markdown item, which Ms. Buckner concluded wasted time. Ms. Buckner also noted that no one had emptied the trash in the restrooms and in the breakroom, which was part of the closing shift duties. Ms. Buckner also noted that no one had mopped the restrooms, which was part of the closing shift duties. Ms. Buckner mopped the restroom floors. Ms. Buckner also concluded that Ms. Zimmerman

had not properly faced the store on Monday evening, April 23. Ms. Buckner was further disappointed to find that Ms. Zimmerman had not broken down the empty boxes.

Before Ms. Buckner left work on April 24, she decided to test whether Ms. Zimmerman would perform the facing duties. Ms. Buckner intentionally left some gallon tea jugs out of place to see whether Ms. Zimmer would face the area and put the jugs in their proper place.

When Ms. Buckner arrived at work on Wednesday, April 25, she was disappointed to find the gallon jugs of tea where she had left them to test Ms. Zimmerman. However, Ms. Zimmerman had left a note in the communication log indicating that she had faced the store shelves. Ms. Buckner noted that the cooler shelves were especially disorderly. Ms. Buckner noted that the breakroom trash had not been collected and that the restrooms had not been mopped. Ms. Buckner mopped the restroom floors. Ms. Buckner also noted that the aisle floors had not been swept and that there were bits of Styrofoam on the floor in the garden aisle. Ms. Buckner further noted that one dollar bills and the five dollar bills in the change bag had not been rubber-banded per protocol. Before Ms. Buckner left work on April 25, she left instructions for Ms. Zimmerman regarding the Wednesday evening duties and the Thursday duties.

On Wednesday evening, Ms. Buckner contacted Ms. Lomker with her concerns about Ms. Zimmerman's work performance in Ms. Lomker's absence. Ms. Lomker instructed Ms. Buckner to document her concerns and Ms. Buckner created journal entries detailing her concerns from April 23, 24 and 25. Ms. Lomker attempted to call Ms. Zimmerman at her cell phone number. When Ms. Zimmerman did not answer, Ms. Lomker left a voice mail message requesting a return telephone call. Ms. Zimmerman did not return the call.

On the evening of April 25, Ms. Zimmerman contacted Ms. Buckner to report that cashier Judy McVay's cash register drawer was \$2.49 short. Ms. Zimmerman stated that she and the employee had counted the drawer three times. The employer's policy required that Ms. Zimmerman telephone a manager if a drawer was off by \$20.00 or more. Ms. Buckner told Ms. Zimmerman that the drawer had balanced when Ms. Buckner counted it earlier in the day and suggested that Ms. Zimmer and Ms. McVay should slow down and count the drawer again. Ms. Zimmerman hung up the phone at that point.

During Ms. Lomker's return trip from her training conference, Ms. Lomker again spoke with Ms. Buckner. During that contact, Ms. Buckner reported that she had attempted to speak with Ms. Zimmerman regarding her concerns, but that Ms. Zimmerman had gotten angry and walked away. Ms. Buckner asserted to Ms. Lomker that Ms. Zimmerman did not respect Ms. Buckner's authority.

Upon Ms. Lomker's return to work on April 27, she again spoke with Ms. Buckner. At that time, Ms. Buckner added a complaint that Ms. Zimmerman had further delegated to other employees the lists of tasks Ms. Buckner had delegated to Ms. Zimmerman.

On April 28, Ms. Zimmerman worked her shift without incident.

On April 30, 2018, Ms. Lomker met with Ms. Zimmerman for the purpose of discharging her from the employment. Ms. Lomker handed her a copy of a reprimand that Ms. Lomker had drafted based on Ms. Buckner's complaints. The reprimand stated as follows:

Did not do task given for shifts noted above. Cleaning, Facing, skyselfs [sic] were not worked leaving them for morning shift to make sure store was customer ready, Knowing that this is a night shift responsibility. Complete disregard for my Assistant Manager and

Store while I was at my Training. Going as far as being rude + uncooperative turning her back on ASM while being given task and walking away. Not working truck or giving cashier rolltainers to work, putting us behind on 7-Day work Flow task as a whole.

Ms. Lomker interpreted Ms. Zimmerman's attempt to respond to the allegations as argument. Ms. Lomker told Ms. Zimmerman that her decision to end her employment was final and then walked away. Ms. Zimmerman asked why Ms. Lomker did not just fire her. Ms. Lomker clarified that she was indeed firing Ms. Zimmerman.

Ms. Lomker factored prior work performance issues and reprimands in her decision to discharge Ms. Zimmerman from the employment.

On March 8, 2018, Ms. Zimmerman miscounted money on hand and concluded the store was short \$212.01. The missing amount was actually in the safe where it had been placed as a periodic "drop." Ms. Zimmerman did not notify Ms. Lomker of the variance. The employer's protocol required that Ms. Zimmerman notify a manager if there was a variance of \$20.00 or more, but Ms. Zimmerman was not aware of the requirement at that time. Assistant Manager Sonya Weir located the missing funds in the safe the following morning. Ms. Weir made certain Ms. Zimmerman understood the variance reporting protocol.

On March 20, Ms. Zimmerman miscounted money on hand and concluded the store was missing \$40.00. The employer located the missing money in the cash register drawer.

On or about March 21, Ms. Lomker issued a reprimand to Ms. Zimmerman for engaging in inappropriate discussion with a customer. A customer in the Dollar General store had inquired of Ms. Zimmerman whether the store was hiring. Ms. Zimmerman told the customer that the customer could have her job. The customer was someone that Ms. Zimmerman also knew outside of work. As Ms. Lomker was leaving for the day, the customer spoke to Ms. Lomker and asked if everything was okay at the store. The customer referenced the customer's conversation with Ms. Zimmerman as the basis for the customer's concern.

On April 5, 2018, Ms. Zimmerman left a \$50.00 bill in the petty cash change bag the staff used to replenish cash registers with change and small denomination currency. The protocol called for smaller bills to be left in the change bag and for larger bills to be included in the bank deposit. Ms. Zimmerman left the \$50.00 bill in the change bag because she did not see a way to exchange it out for smaller bills. However, Ms. Lomker determined that it had in fact been possible to exchange the \$50.00 for smaller bills in connection with closing out the cash register drawers at the end of the business day. Ms. Lomker issued a reprimand to Ms. Zimmerman in connection with the incident.

On April 20, 2018, Ms. Zimmerman counted the cash register drawers as part of her closing duties on April 12 and concluded there was an extra \$20.00. Ms. Zimmerman did not notify a manager of the variance. Instead, Ms. Zimmerman left the \$20.00 on the desk in the locked office with a note. Ms. Zimmerman elected not to take steps to secure the money in the safe because she was otherwise ready to leave for the day. Ms. Lomker issued a written reprimand to Ms. Zimmerman in response to Ms. Zimmerman's failure to contact her regarding the variance and failure to properly secure the money in the safe.

Ms. Zimmerman established a claim for benefits that Iowa Workforce Development deemed effective April 29, 2018. Ms. Zimmerman's base period consists of the four quarters of 2017. Dolgencorp, L.L.C. is not a base period employer in connection with the claim year that began

for Ms. Zimmerman on April 29, 2018. Ms. Zimmerman received \$2,463.00 in benefits for the eight-week period of April 29, 2018 through June 23, 2018.

On May 11, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Zimmerman's separation from the employer. Ms. Zimmerman participated in the fact-finding interview and provided a truthful statement to the deputy. The employer submitted documents for the fact-finding interview view that included a summary statement that Ms. Zimmerman was discharged for failure to follow the instructions of the assistant manager. The employer's documentation included copies of the documents that were received into evidence at the appeal hearing as Exhibits 1 through 7. At the time of the fact-finding interview, the deputy attempted to reach Ms. Lomker at the number the employer's representative had designated as the number where Ms. Lomker could be reached for the hearing. Neither Equifax/Talx nor Dolgencorp, L.L.C. had notified Ms. Lomker of the fact-finding interview. The deputy left a voicemail message for Ms. Lomker. Ms. Lomker was busy with other matters and did not review the message in time to return the call to the deputy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record establishes misconduct in connection with the employment. The weight of the evidence establishes that Ms. Zimmerman did indeed unreasonably fail to comply with Ms. Buckner's reasonable instructions regarding duties that needed to be performed during Ms. Zimmerman's shifts while Ms. Lomker was away. Mr. Zimmerman's conduct did indeed rise to the level of insubordination. The weight of the evidence establishes that Ms. Zimmerman did indeed leave the store in a state of relative disarray during multiple shifts and so carelessly performed the markdown that the work had to be redone. The final conduct that played during the last week of the employment followed several prior instances in which Ms. Zimmerman was careless and/or negligent in performing work duties. The final conduct also occurred in the context of multiple prior warning for carelessness and/or negligent behavior. The pattern of conduct indicated a willful and substantial disregard of the employer's interests.

Because the evidence establishes a discharge based on misconduct in connection with the employment, Ms. Zimmerman is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Zimmerman must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith

and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Zimmerman received benefits, but has been disqualified for those benefits through this decision. Accordingly, the \$2,463.00 in benefits that Ms. Zimmerman received for the eight-week period of April 29, 2018 through June 23, 2018 constitutes an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The documentation the employer submitted for the fact-finding interview was sufficient to satisfy the participation requirement, despite Ms. Lomker's absence from the proceeding. Because the employer participated in the fact-finding interview within the meaning of the law, Ms. Zimmerman is required to repay the overpaid benefits. Because the employer is not a base period employer, the employer's account has not been charged for benefits paid to Ms. Zimmerman. Based on the disqualifying discharge, the employer's account shall not be charged for benefits.

DECISION:

The May15, 2018, reference 01, decision is reversed. The claimant was discharged on April 30, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account has not been charged and shall not be charged. The claimant is overpaid \$2,463.00 in benefits for the eight-week period of April 29, 2018 through June 23, 2018. The claimant must repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs