

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EMMETT BROWN**  
Claimant

**APPEAL NO. 10A-UI-13915-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAMILY DOLLAR SERVICES INC**  
Employer

**OC: 09-05-10**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 29, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 19, 2010. The claimant participated in the hearing. Jennifer Foster, Human Resources Area Manager, participated in the hearing on behalf of the employer.

**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: The claimant was employed as a full-time forklift operator for Family Dollar Services from February 11, 2002 to June 24, 2010. He was discharged for failing to meet the employer's productivity levels. Employees are required to meet a daily production goal of 85 percent. The employer uses a four-step disciplinary policy. On May 12, 2010, the claimant received an initial written warning for not meeting the daily production goal, which the employer considers to be impeding productivity, because he was at 80.2 percent. On May 27, 2010, he received a written warning for not meeting the daily production goal because he was at 79.2 percent. On June 7, 2010, he received a written warning for not meeting the daily production goal because he was at 81.7 percent. On June 8, 2010, he received a one-time final written warning for not meeting the daily production goal because he was at 77.3 percent, but the incident, which would have caused the claimant's termination, came only one day after the June 7, 2010, warning. On June 24, 2010, the claimant's employment was terminated for not meeting the daily production goal because he was at 79.6 percent. The claimant testified he did the job to the best of his ability but his production dropped when third shift, where he previously worked, was abolished and he was moved to second shift, where the department manager did not enforce safety practices, which allowed employees who chose not to follow safety procedures to go faster and the claimant refused to work that way. The claimant did try to talk to the department manager, but the department manager's bonus depended on his shift's productivity, so the claimant did

not believe he was open to hearing about his safety concerns. The claimant was not aware the employer had a safety director/training manager located in the building where he worked.

### **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 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 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). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. EAB, 423 N.W.2d 211 (Iowa App. 1988). While the claimant did have the ability to perform the job, his decision to, correctly it would seem, follow safety rules ignored by other

employees and the department manager slowed his productivity. There is no evidence of intent on the part of the claimant to deliberately fail to meet the employer's production expectations. Under these circumstances, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

**DECISION:**

The September 29, 2010, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw