

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILLIP W CAMPBELL
Claimant

APPEAL NO. 12A-UI-13608-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS INC
Employer

OC: 09/30/12
Claimant: Respondent (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Lowe's Home Centers, Inc. filed a timely appeal from a representative's decision dated November 6, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 13, 2012. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. Participating as a witness for the claimant was Mr. Brandon Tidwell, Human Resource Manager, Davenport, Iowa.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Phillip Campbell was employed by Lowe's Home Centers, Inc. from February 19, 2009 until May 11, 2012 when he was discharged for repeated violations of company policy. Mr. Campbell was employed as a full-time flooring sales specialist and was paid by the hour. His immediate supervisor was Bill Eluan.

Mr. Campbell was discharged on May 11, 2012 when the employer reasonably concluded that he had again reported for work "unfit for duty" after previously having been issued a final warning for the same offense.

On May 10, 2012, two company employees complained that the claimant appeared to be under the influence of alcohol that morning. The company followed its procedure by having two separate management individuals who had been trained personally and independently observe Mr. Campbell that morning. Brandon Tidwell personally worked with Mr. Campbell for approximately 20 minutes that morning noting that the claimant smelled heavily of alcohol, had bloodshot eyes and noted the claimant was having difficulty coordinating his movements. Mr. Tidwell then had a second management individual independently observe Mr. Campbell. Subsequently, both management individuals conferred and concluded that they had both

reached the same conclusion that the claimant had reported for work that day “unfit for duty” in violation of company policy.

Based upon Mr. Campbell’s demeanor that day and the employer’s reasonable and independent conclusion that he had reported to work “unfit for duty” a decision was made to terminate Mr. Campbell from employment as he had been previously specifically warned by the company for the same infraction on November 25, 2009. The claimant was warned at that time that reporting to work again unfit for duty in the same or similar manner would result in his termination from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged for misconduct. It does.

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. 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. of Appeals 1992).

In this matter the evidence in the record establishes that the claimant was discharged based upon the specific and independent conclusions of two management officials of Lowe's Home Centers on May 10, 2012 that the claimant again reported for work "unfit for duty" in violation of both company policy and a specific final warning that had previously been issued to him by the company for the same type of offense. Mr. Tidwell and the second manager both concluded that Mr. Campbell had reported for work unfit for duty as he had heavily smelled of alcohol, had bloodshot eyes and was having difficulty in coordinating his movements while performing his job duties for the company.

Because the claimant was aware of the company's policy requiring employees to report to work fit for duty and the claimant had been previously specifically warned for the same or similar conduct, the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant was discharged under disqualifying conditions. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated November 6, 2012, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, and meets all other eligibility requirements of Iowa law. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs