

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BENJAMIN E MERINO

Claimant

LOWE'S HOME CENTERS, LLC

Employer

**CASE NO. 21IWDUI2096
IWD APPEAL NO. 21A-UI-07595**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 1/31/2021
Claimant: Appellant (2)**

Iowa Code § 96.5(2)(a) – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Benjamin Merino filed a timely appeal from a March 9, 2021, unemployment insurance decision that denied unemployment benefits to the claimant based on his "failure to follow instructions in the performance of [his] job." A telephone hearing was held May 4, 2021. The parties were properly notified of the hearing. Merino testified and was represented by attorney Andrew Giller. Lowe's Home Centers (Lowe's) did not call in at the scheduled hearing time.

Brett Conrey, account representative with Thomas & Company, submitted documents on behalf of the employer. The documents were emailed to the undersigned and were cc'd to the claimant's address. Merino denied receiving documents from Lowe's, so the documents were emailed to Merino's attorney for review. Merino's counsel objected to the exhibits because Merino denied receiving them prior to the hearing. The undersigned overruled the objection and allowed the exhibits into the record as Employer's Exhibit 1. Merino did not submit exhibits. Official notice was taken of the documents in the administrative file.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Merino was employed as a full-time delivery driver at Lowe's. He began working at Lowe's in October 2016, and he was terminated on or about January 31, 2021. His supervisor was Sarah Waldschmidt. (Merino testimony.)

Store manager Amanda Semulka-George fired Merino in her office after his shift on January 31. The only individuals in the office were Semulka-George, Merino, and an assistant manager named Josh. Semulka-George told Merino he was terminated because more than one statement was submitted against him and because of an old attendance write-up. He did not receive a termination letter. (Merino testimony.)

Merino believes the statements against him were from a January 13, 2021, incident. Merino was scheduled to deliver 5-7 pallets of cabinets to a home in Iowa City, but he did not deliver the cabinets because of snow and ice. Merino drove to the delivery location and determined the sidewalk and driveway were covered with snow and ice. The delivery would require Merino and another employee to move the cabinets with a pallet jack on wheels, which could not be done safely on snow and ice. Merino notified Natasha, a Lowe's coordinator who rescheduled deliveries. He had postponed previous deliveries because of weather conditions, and he was not told his job was in jeopardy on January 13. (Merino testimony.)

Merino received a call from Lowe's HR around January 20, and an HR employee asked him questions about the postponed delivery. He did not believe he was receiving a warning. He spoke to Semulka-George after speaking with HR to ask if everything was ok, and she said it was not Merino's problem. Merino also communicated with Mike, an assistant manager who agreed the January 13 delivery was unsafe. (Merino testimony.)

Merino was written up on July 14, 2020, because he clocked out early after completing deliveries. He was not feeling well that day and had COVID-19 symptoms, so he told a manager he was

leaving work. He denied allegations he aggressively pushed a dolly, used profanity, or treated an appliance carelessly. (Merino testimony.)

Documents submitted by Lowe's specify Merino was terminated "[a]s a result of an investigation." A termination notice was dated January 27, 2021, and list January 29, 2021, as Merino's last day at work. Merino received a written notice on July 14. The reasons for this notice were "clocked out early, frustration." (Ex. 1.) Lowe's Associate Standards of Conduct Policy were submitted by the employer, without noting specific policies allegedly violated by Merino. (Ex. 1.)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the March 9, 2021, unemployment insurance decision that found Merino ineligible for unemployment insurance benefits for failure to follow instructions is reversed.

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.

Iowa Administrative Code rule 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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. However, if the employer fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The employer must show the final incident that resulted in the discharge was a current act of misconduct. Iowa Admin. Code r. 871-24.32(8); see *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). A Lowe's representative did not attend the hearing and only submitted limited documents regarding Merino's termination. These documents specify Merino was terminated "[a]s a result of an investigation." In July 2020 – approximately six months prior to his termination – Merino failed to complete his shift and may have pushed an appliance dolly. An incident in July 2020 cannot be the underlying reason for a January 2021 termination because the July incident was not a current act of misconduct. See *Greene*, 426 N.W.2d at 659.

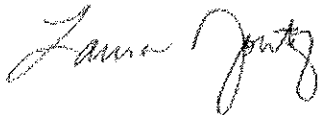
The only detailed information regarding Merino's January 2021 termination came from Merino. Since Lowe's did not send a representative who could potentially refute Merino's testimony, I found Merino's testimony credible. Merino refused to deliver pallets of cupboards to a home on January

13, 2021, because of snow and ice at the delivery site. Merino notified the scheduling employee he would not make the delivery on January 13, and he was not told his job was in jeopardy. Documents from Lowe's indicate an investigation was completed, but details from the investigation were not submitted to the record. I do not find Merino's delivery refusal rose to the level of misconduct. His decision to delay the delivery because of snow and ice did not harm Lowe's and was made to prevent damage to the cabinets and/or injury to Merino and his delivery partner. Lowe's failed to provide credible evidence Merino committed misconduct in January 2021. Any mistakes Merino may have made at work were good faith errors in judgment, ordinary negligence, or inability/incapacity to properly complete the assigned tasks. See Iowa Admin. Code r. 871-24.32(1)(a).

Lowe's Home Centers, LLC did not satisfy its burden of proof required to disqualify Merino from unemployment insurance benefits. Because Lowe's failed to establish disqualifying misconduct, benefits are allowed, provided Merino is otherwise eligible.

DECISION:

The March 9, 2021, unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.



Laura Jontz
Administrative Law Judge

May 10, 2021

Decision Dated and Mailed

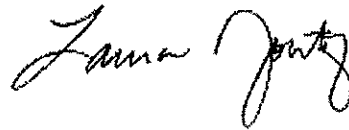
CC: Benjamin E Merino, Claimant (By First Class Mail)
Lowe's Home Centers, LLC, Employer (By First Class Mail)
Nicole Merrill, IWD (By Email)
Joni Benson, IWD (By Email)
Andrew Giller, Attorney for Claimant (By First Class Mail – 115 First Ave SE, Ste 201,
Cedar Rapids, IA 52401)

Case Title: MERINO V. LOWE'S HOME CENTERS LLC

Case Number: 21IWDUI2096

Type: Order

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Laura Jontz". The signature is written in a cursive, flowing style.

Laura Jontz, Administrative Law Judge