

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HOPE L BROUWERS
Claimant

LOWE'S HOME CENTERS LLC
Employer

APPEAL 19A-UI-06926-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/04/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Lowe's Home Centers LLC, filed an appeal from the August 22, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision which allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 25, 2019. The claimant participated. The employer participated through Erin Thompson, assistant manager of operations.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-32 were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a cashier and was separated from employment on July 31, 2019, when she was discharged for excessive absenteeism.

The employer has an attendance policy which designates point values to unplanned absences or tardies. It is a no-fault policy, which means an employee will incur a point regardless of the reason of an absence. The employer also requires its employees to notify management two hours prior to a shift if they are unable to work. The claimant was made aware of the employer's policies upon hire and was issued a final written warning on April 18, 2019 due to her attendance.

The final incident occurred on June 24, 2019 when the claimant was absent to take her minor son to Iowa City to a neurologist appointment. The claimant had tried to apply for, but ineligible for FMLA, and tried to secure coverage of her shift by asking other employees to work for her. She properly reported the absence to the employer. Thirty-seven days later, on July 31, 2019, she was discharged for "pointing out" on June 24, 2019. Ms. Thompson attributed the delay in discharge to having to coordinate schedules with human resources to get the approval to terminate and then with the claimant's schedule so that they could meet for the discharge.

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. Benefits are allowed.

Iowa Code § 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 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).

In the specific context of absenteeism, the administrative code provides:

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) (“rule [2]4.32(7)...accurately states the law”).

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep’t of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

The claimant in this case was discharged on July 31, 2019, based upon her absence on June 24, 2019.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Employee misconduct must be a current act in order to deny unemployment benefits. *Myers v. Iowa Dep’t of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). The most recent incident leading to discharge must be a current act of misconduct in order to disqualify an individual from receiving benefits. This incident must occur within a reasonable period from the discharge date. The issue is when the employer learned of the current act and did it act to terminate the individual within a reasonable period of time. An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp’t Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

In this case, the claimant was not discharged for over a month after the employer had awareness of the final incident. The employer cannot on one hand argue that the claimant’s absence on June 24, 2019 was so egregious that it warranted discharge instead of a lesser penalty, but then allow the claimant to continue working until July 31, 2019 before determining she should be discharged. Based on the undue delay, the June 24, 2019 incident was no longer a final or current act according to Iowa law.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant’s discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant’s discharge was due to a final or current act of job

related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because benefits are allowed, the issues of overpayment and chargeability are moot.

DECISION:

The August 22, 2019 (reference 01) initial decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn