

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TONY J BOGUE
214 E GILMAN
SHEFFIELD IA 50475

LOWES HOME CENTERS INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12819-HT
OC: 10/31/04 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, Lowe's, filed an appeal from a decision dated November 23, 2004, reference 01. The decision allowed benefits to the claimant, Tony Bogue. After due notice was issued a hearing was held by telephone conference call on December 22, 2004. The claimant participated on his own behalf. The employer participated by General Manager David Creamer

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Tony Bogue was employed by Lowe's from

March 20 until October 24, 2004. He was a full-time sales associate. He had received written warnings on September 17 and October 5, 2004, which notified him his job was in jeopardy. One warning was for being no-call/no-show to work on two days due to not reading the schedule properly. He was aware of the employer's policy, which requires employees who have an unscheduled absence to notify the manager on duty prior to the start of this shift.

The claimant was absent on Friday, October 15, 2004, because he had a doctor's appointment. He notified the employer as required then brought a doctor's statement to General Manager Dennis Creamer, excusing him from work through October 17, 2004. Mr. Bogue stated he had another doctor's appointment at 10:00 a.m. on Monday, October 18, 2004, and Mr. Creamer told him to let the store know if he was going to make it in for his shift that day at 1:00 p.m.

Mr. Bogue was no-call/no-show for his shift on October 18, 2004. His doctor's appointment was over before 11:00 a.m. but he was "running errands" with his mother and did not get home to call in prior to his shift. A shift supervisor called him between 1:30 p.m. and 2:00 p.m. to ask where he was, and that was when he said his doctor excused him from work for the day.

When the claimant returned to work on Tuesday, Store Manager Rick Nelson told him they would "have to talk," but he could not do it right away. Mr. Bogue acknowledged he knew this meant he would likely be discharged because he had been previously warned about his attendance. He worked until October 24, 2004, when Mr. Nelson told him he was discharged.

Tony Bogue has received unemployment benefits since filing a claim with an effective date of October 31, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 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.

The claimant had been advised his job was in jeopardy as a result of his failure to work his scheduled shifts and for failing to notify the employer of his absences in a timely manner. In spite of this warning the claimant did not call in prior to his shift on October 18, 2004, although there was nothing to prevent him from doing so except that he was "running errands" with his mother after his doctor's appointment.

Although six days passed between the final incident and the discharge, the store manager made it clear to the claimant the day he returned to work that further action would be taken. Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) found that a lapse of 11 days between the final incident and the discharge did not put the final act a "past act" since the employer had notified the claimant on the fourth day that his conduct was grounds for dismissal. Given the store manager's notice to the claimant on October 19, 2004, the administrative law judge finds that the passage of six days in this case also does not make the final, unreported absence as a "past act" and the claimant was discharged for another incident of unreported absence. Even though the absence was due to illness, it was not properly reported and was therefore unexcused. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for excessive, unexcused absenteeism which is misconduct under the provisions of the above Administrative Code section. He is disqualified.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of November 23, 2004, reference 01, is reversed. Tony Bogue is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$662.00.

bgh/smc