

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

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

Appeal Number: 04A-UI-09785-DT
OC: 08/15/04 R: 04
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Lowe's Home Centers, Inc. (employer) appealed a representative's September 3, 2004 decision (reference 01) that concluded Eric M. Erschen (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 4, 2004. The claimant participated in the hearing. Mark Lawlor appeared on the employer's behalf. One other witness, Debra Schmidt, was available on behalf of the employer but did not testify. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE: Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 12, 2004. He worked full time as a salaried sales specialist in the millwork department of the employer's Dubuque store. His last day of work was August 10, 2004. The employer discharged him on that date. The reason asserted for the discharge was that the claimant had engaged in unproductive behavior by circulating a petition and approaching associates to try to get rid of the store manager, Mr. Lawlor, and the store operations manager.

Sometime in June, a disgruntled associate had approached the claimant and had asked the claimant if he was interested in trying to do something to get rid of Mr. Lawlor and the operations manager. The claimant told the associate that he was happy in what he was doing in the store and did not wish to get involved with anything. A few days before August 10, three store associates from different departments in the store approached the operations manager and asserted that the claimant had approached them while both he and they were on duty and had solicited them to sign onto a petition to get rid of Mr. Lawlor and the operations manager. Mr. Lawlor had the associates put their statements in writing; however, while the statements were read by Mr. Lawlor (without names) during the hearing, neither the actual statements nor the associates themselves were presented in hearing for examination by the claimant. The claimant denied having ever approached any associates or, other than the June conversation where an associate approached him, having any discussion regarding a petition or other effort to take action against Mr. Lawlor or the operations manager. He suggested that there could have been associates who might have been motivated to get him removed due to resentment of his high sales figures.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the conclusion that he was approaching associates to seek support for a petition to get rid of the store manager and the operations manager. However, the claimant denied any involvement with a petition or similar. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the three associates; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the associates are credible. Where, without satisfactory explanation, relevant and direct evidence within the control of a party whose interests would naturally call for its production at hearing is not produced, it may be inferred that evidence would be unfavorable. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided,

the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 3, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/tjc