

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

JAVIER A GUZMAN  
1126 – 19<sup>th</sup> ST APT 2  
DES MOINES IA 50314

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

Appeal Number: 04A-UI-11287-CT  
OC: 09/26/04 R: 02  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Lowe's Home Centers, Inc. (Lowe's) filed an appeal from a representative's decision dated October 11, 2004, reference 01, which held that no disqualification would be imposed regarding Javier Guzman's separation from employment. After due notice was issued, a hearing was held by telephone on November 16, 2004. Mr. Guzman participated personally. The employer participated by John Rissmiller, Store Manager.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Guzman was employed by Lowe's from April 24, 2003 until August 11, 2004 as a full-time customer service associate in the garden center. On July 15, 2004, a customer indicated that he had been in a few days earlier to purchase cypress mulch. He indicated he asked an associate about the cost of bags that were partially open and was told they were half-price. He indicated that there were only two bags of the discounted mulch present but that he witnessed the associate rip open additional bags for his purchase. The customer returned to the store on July 15 because of guilt over having purchased the bags of mulch that he felt were deliberately ripped open. It was Mr. Guzman's recollection that he checked other pallets of mulch to find ones that were opened so he could sell them to the customer. He denied having deliberately ripped any bags of mulch open.

The employer did not discuss the customer's allegations with Mr. Guzman until August 11, the date of his discharge. During the interim, Mr. Guzman continued to perform his usual job except for one week when he was on vacation. The delay in discharging him was due to the fact that the employer wanted to consult with the corporate human resources office before making a determination. The store manager had the authority to discharge Mr. Guzman without conferring with human resources.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Guzman was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer's burden included establishing that the discharge was due to a current act of misconduct. In the case at hand, the employer knew of the allegation against Mr. Guzman on July 15 but took no steps to discharge or even discuss the matter with him until August 11, almost one month later. Inasmuch as the store manager had independent authority to discharge, no justification for the delay has been established. It is concluded, therefore, that a current act of misconduct has not been established.

Even if the administrative law judge were to conclude that the employer established a current act, misconduct would not be established. The employer's evidence on the issue consists solely of hearsay testimony from an unidentified source. Mr. Guzman was credible in his explanation of where he obtained the additional bags of mulch for the customer. The administrative law judge is not inclined to give more weight to the employer's hearsay testimony from an unidentified source than to Mr. Guzman's sworn, credible testimony. It would be concluded, therefore, that the employer failed to establish that Mr. Guzman engaged in misconduct by deliberately ripping open bags of mulch on or about July 15, 2004.

#### DECISION:

The representative's decision dated October 11, 2004, reference 01, is hereby affirmed. Mr. Guzman was discharged by Lowe's but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/kjf