

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

ROBERT L LEMEUSE JR
617 S JACKSON ST
OSCEOLA IA 50213

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

Appeal Number: 04A-UI-01791-HT
OC: 01/04/04 R: 03
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 February 9, 2004, reference 01. The decision allowed benefits to the claimant, Robert LeMeuse. After due notice was issued a hearing was held by telephone conference call on March 22, 2004. The claimant provided two telephone numbers. The first one, 240-5031, was dialed at 8:00 a.m. and 8:02 a.m. and allowed to ring ten times but there was no answer. The second number (641)533-4333 was called and the claimant's stepfather, Larry Curtis, answered the phone but the claimant was not present. A message was left notifying the claimant the hearing would precede without his

participation unless he called the toll-free number prior to the close of the record. By the time the record was closed at 8:19 a.m. the claimant had not responded and did not participate. The employer participated by Human Resources Manager Loretta Skyler.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Robert LeMeuse was employed by Lowe's from October 2, 2001 until August 26, 2003. He was a full-time stocker. He received a copy of the employee handbook and also attended safety orientation and training on the operation of power equipment.

On August 21, 2003, the claimant was operating a cherry picker and damaged a sink. It was not totally destroyed but was damaged to the point that it could not be sold. He did not report the incident to the manager on duty as required by the company policies. Another employee witnessed the accident and reported it to the manager on duty the next day. Store Manager John Rissmiller was notified and he investigated by taking pictures of the damage and taking statements from the claimant and the witness. Mr. LeMeuse admitted to damaging the sink but did not explain why he failed to notify the manager on duty as required. He was discharged for violation of the company policies.

Robert LeMeuse has received unemployment benefits since filing a claim with an effective date of January 4, 2004.

The record was closed at 8:19 a.m. The claimant called at 10:17 a.m. He had received the notice of the hearing and provided two telephone numbers where he could be contacted. One was his cell phone, which he had put on "silent" mode and therefore it did not ring when the calls were placed at 8:00 a.m. and 8:02 a.m. He did not call within five minutes of the scheduled start time for the hearing but waited over two hours.

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).

The incident which damaged the merchandise may have been an accident. However, the claimant's failure to notify the manager on duty was not. Failure to report the incident delayed any investigation the employer may have wanted to do and take whatever steps were necessary to deal with the incident. This is a willful violation of a known company rule and is conduct not in the best interests of the employer. The claimant 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.

The next issue is whether the record should be reopened. The administrative law judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

- a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
- b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
- c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The claimant received the notice of the hearing, he knew the time and date it was to be held and provided a phone number where he could be reached. The administrative law judge attempted, in good faith, to contact him at both numbers. The reason he did not participate was that he had turned his cell phone ringer off and did not hear it. The participants at hearing are responsible for making themselves available at the time and date scheduled, and to not turn off their phones so they can receive the calls. Reopening the record must be for good cause and that is more than "an excuse, a please, apology, extenuation or some justification for the resulting effect." Houlihan v. EAB, 545 N.W.2d 863, 866 (Iowa 1996). The claimant did not provide good cause for reopening the record and the request is denied.

DECISION:

The representative's decision of February 9, 2004, reference 01, is reversed. Robert LeMeuse 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 \$2,799.00.

bgh/kjf