

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

LINDA L PFAU
Claimant

APPEAL NO. 12A-UI-13763-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS INC
Employer

OC: 10/21-=/12
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 7, 2012, reference 01, decision that allowed benefits. After due notice was issued, an in-person hearing was held on March 28, 2013 at Burlington, Iowa. The claimant did participate and was represented by Jan E. Rutledge, Attorney at Law. The employer did participate through Amanda Sernulka-George, Store Manager. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed at Lowe's Home Centers, Inc. as a live nursery sales specialist full time beginning April 8, 1999 through October 19, 2012 when she was discharged. The claimant was discharged by the store manager for a safety violation she committed at 8:55 p.m. on October 2, 2012 in front of Ms. Sernulka-George, the store manager. The claimant had been trained on policies and procedures specifically related to driving the forklift. She knew that whenever a fork truck was being operated in any area where customers were allowed when the store was open that she was required to have an "escort." The escort role was covered in the training and the claimant had received. The escort was to walk ten feet in front of the fork truck whenever the truck was in use when the store was open. The claimant had demonstrated an ability in the past to properly follow the escort policy and to comply with it. She knew the policy. Despite the claimant's assertion to the contrary, the evidence establishes that the claimant operated the fork truck in an area that customers were allowed to shop and walk in without an escort at 8:55 p.m. on October 2, 2012. The store manager unlocked the gate and let the claimant and Don out into an area of the parking lot. The claimant used the escort Don for a portion of the trip she was making, but then drove off without waiting for him to escort her to the location where she parked her fork truck. The claimant drove approximately seventy-five feet in an area where

customers were allowed to wander and shop without an escort. There is no dispute this was an area outside of the building where customers were allowed to shop for garden or lawn supplies. The claimant's forklift license was taken from her on October 5, (she was off work on October 3 and 4) while the employer investigated the incident. The claimant knew only two days after the incident that the employer was investigating her conduct. The claimant provided a written statement of what occurred on October 5. The claimant had a prior safety violation in July 2012. The employer's handbook and policies, a copy of which had been given to the claimant, provides that safety violations can result in immediate termination. The claimant admitted at the hearing, that when driving to park the fork truck she was driving in an area where product was for sale to customers and any customer who wanted to could walk in that area.

The claimant has received unemployment benefits after the separation on a claim with an effective date of October 21, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The administrative law judge is

persuaded that the claimant drove a fork lift in an area where customers were allowed to browse merchandise. Despite the claimant's explanation to the contrary, she drove the fork lift in an customer area without using the proper spotter even though she had demonstrated an ability to do so in the past. The claimant's actions constitute a safety violation. She had prior warnings for safety violations. Her failure to use a spotter is sufficient job connected misconduct to disqualify her from receipt of unemployment insurance benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The November 7, 2012 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND: The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/tll