

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

JOHN E VAUGHAN
1301 S CENTRAL AVE
BURLINGTON IA 52601

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

Appeal Number: 05A-UI-08438-DT
OC: 07/04/05 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 August 12, 2005 decision (reference 01) that concluded John E. Vaughan (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 August 31, 2005. The claimant participated in the hearing. Karen Taylor appeared on the employer's behalf. 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 June 22, 2002. He worked full time as a customer service associate in the tool department of the employer's Burlington, Iowa store. His last day of work was July 21, 2005. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer allows employees to have five days in a 12-month period before requiring doctor's excuses for absences and before beginning the disciplinary process. The claimant exceeded the five-day level in the summer of 2004 and received notice warnings regarding his attendance on at least August 25, 2004 and October 4, 2004. The claimant has an upper back condition, a neck cervical fusion. He occasionally would leave work early due to pain from this condition, or due to dizziness caused either by his medication or his condition. Some of the claimant's absences for which he was warned was for leaving work prior to the end of his shift without proper notification.

On January 20, 2005 the claimant applied for intermittent FMLA (Family Medical Leave) which was certified by his doctor to apply to the days he had to leave early or days he had to be off due to pain related to his back/neck condition. The request was granted, but he was informed he would still need to inform the manager on duty any day that he was leaving early due to the pain, and that he would still need to provide a doctor's excuse for that day. The claimant tried to comply with these requirements for a period, but found that getting the doctor's excuses on a daily basis was very difficult; that was the issue he had been trying to avoid by obtaining the intermittent FMLA status. On April 14, 2005 he was given a final warning for missing additional work.

The claimant was scheduled to work from 1:00 p.m. to 10:00 p.m. on July 16, July 17, and July 19, 2005. On July 16, the claimant left and did not return after working four hours; on July 17, he left and did not return after working six hours; on July 19, he left and did not return after working five hours. On two of the days, the claimant had left at lunch and had informed the manager on duty he would not be returning that afternoon due to his condition; the manager had apparently not made a note of the claimant's report, and so human resources was unaware that the claimant had contacted the manager on duty before leaving. On the other day, the claimant had gone to his doctor's office during the day and had passed out in the doctor's office. The doctor's office then told the claimant to go home, and the doctor's office contacted the employer and reported the claimant would not be returning the rest of the day. The employer apparently did not make note of the doctor's report, so human resources was unaware of the claimant's status.

On June 20, 2005 the claimant was scheduled to work 6:00 a.m. to 3:00 p.m. He called that morning and reported that he was not going to be able to work due to his condition. When he sought to return to work on June 21, 2005, he was discharged.

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 decisions. 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 §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).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline for the absence under its attendance policy. Cosper, supra. The employer was aware of the nature of the claimant's medical condition and had fair warning that he would likely periodically be absent because of the condition. Floyd v. Iowa Department of Job Service, 338 N.W.2d 536 (Iowa App. 1983). The claimant did properly report his absences from work. Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. 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 August 12, 2005 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/pjs