

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

DAVID J ABENDROTH  
2600 E SHERIDAN  
DES MOINES IA 50317

LENSCRAFTERS INC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-01588-JTT  
OC: 01/01/06 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, 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.

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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:

LensCrafters filed a timely appeal from the January 30, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 27 2006. Claimant David Abendroth participated. Linda Green of TALX UC eXpress represented the employer and presented testimony from Regional Team Lead Julie Peterson.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: David Abendroth was employed by LensCrafters as a part-time sales associate through December 10, 2005, when Regional Team Lead Julie Peterson discharged him. At the time of the separation, Mr. Abendroth was assigned to the Jordan Creek store. Mr. Abendroth had commenced his employment on July 5, 2003, under previous ownership and prior to the

relocation to Jordan Creek. The employment had initially been full-time, but was reduced to 32 hours per week and then to 25 hours per week by the new owner. Mr. Abendroth's immediate supervisor was Frank Marcum.

On or about November 8, 2005, Regional Team Lead Julie Peterson learned that Mr. Abendroth and Mr. Marcum cohabited and were in an intimate relationship. Optical Team Lead/Regional Team Lead Corey Orbitz, who held a supervisory position over Mr. Abendroth and Mr. Marcum, had been aware of the relationship for several months prior to sharing the information to Ms. Peterson. In March 2005, the new owners had implemented a policy that coworkers within the same store could not cohabit or be involved in intimate relationships. Mr. Abendroth's relationship with Mr. Marcum significantly predated the effective date of the new policy.

After Ms. Peterson learned of the relationship between Mr. Marcum and Mr. Abendroth, Ms. Peterson advised Mr. Abendroth that he would need to transfer to a different store or leave the employment. Mr. Abendroth had never been reprimanded in the course of the employment. Ms. Peterson offered Mr. Abendroth a position at a store in Urbandale or in Ankeny. Mr. Abendroth had been a loyal employee at the store where he worked and, despite having endured the reduction in hours of employment, was not interested in transferring to another store. In addition, Mr. Abendroth relied upon Mr. Marcum for transportation and lacked means to get to either of the offered stores. The Urbandale store was approximately eight miles away from the Jordan Creek store. The Ankeny store was much further away. When Ms. Peterson concluded that Mr. Abendroth was not going to reconsider his position on the proposed transfer, she notified Mr. Abendroth that his last day of employment would be December 10, 2005. Mr. Abendroth continued to work up to that point and would have continued in the employment, had he been allowed to remain at the Jordan Creek store.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Marcum was discharged for misconduct in connection with the employment. It does not.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act to misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

The evidence in the record fails to establish a "current act" of misconduct that would disqualify Mr. Abendroth for unemployment insurance benefits. The evidence in the record indicates that the employer was actually aware of the relationship between Mr. Abendroth and Mr. Marcum for several months prior to taking any action to implement the policy in question and force a transfer. Because the employer knew of the relationship and took no action concerning the relationship for a significant period afterwards, by the time Ms. Peterson took action, Mr. Abendroth's violation of the cohabitation and relationship policy no longer constituted a current act. In addition, the evidence in the record fails to establish that the relationship, even in the context of the policy, constituted substantial misconduct that would disqualify a claimant for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Abendroth was discharged for no disqualifying reason. Accordingly, Mr. Abendroth is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Abendroth.

DECISION:

The Agency representative's decision dated January 30, 2006, references 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/kjw