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

MICHAEL R BROWNE
3614 MEMORY LN
WATERLOO IA 50701-9359

LOWE'S HOME CENTERS INC
C/O TALX UCM SERVICES INC
PO BOX 283
SAINT LOUIS MO 63166

Appeal Number: 06A-UI-02905-S2T
OC: 02/12/06 R: 03
Claimant: Appellant (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 for Misconduct

STATEMENT OF THE CASE:

Michael Browne (claimant) appealed a representative's March 2, 2006 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Lowe's Home Centers(employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 31, 2006. The claimant participated personally. The employer participated by Rhonda Ackerman, Human Resources Manager; John McKenna, Store Manager; and Dennis Creamer, Sales Manager.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 4, 2005, as a full-time cabinet sales associate. The claimant signed for receipt of the company handbook on April 4, 2005. The handbook prohibits the consumption of alcohol on a lunch break. On July 8, 2005, employer issued the claimant a written warning for a safety code violation regarding the use of a power tool while pulling freight.

On February 15, 2006, the claimant went to lunch with two co-workers and a department manager. The waitress asked what they wanted to drink. The group discussed it and the department manager stated that he thought the handbook allowed an employee to have one drink at lunch. All four ordered one beer. The claimant ordered the beer because the department manager discussed the policy. The two co-workers drank their beer and ordered a soft drink. The claimant and the department manager were still drinking their beers when the Human Resources Manager walked into the establishment.

The Human Resources Manager thought the claimant and the department manager each had two beers and the co-workers had soft drinks. The claimant and the co-workers went back to work. The department manager did not return to work because he had an appointment. Later that day the employer suspended the claimant. The employer asked the department manager and co-workers for statements about the claimant's activities at lunch on February 15, 2006. There was no mention in the three statements about the co-workers drinking. The co-workers are still employed. The employer terminated the claimant on February 17, 2006.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was the only eye witness to the what took place at lunch.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant testified that he would not have had a beer at lunch if the department manager had not said he thought it was acceptable for employees to have one drink at lunch. The employer treated the three co-workers inconsistently. The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which she was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's March 2, 2006 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/tjc