

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRANCE D ETZEL

Claimant

APPEAL NO. 06A-UI-11367-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS INC

Employer

**OC: 10/22/06 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated November 15, 2006, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on December 12, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing. Trisha Tinnes participated in the hearing on behalf of the employer with a witness, Mark Klein.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full-time for the employer from April 7, 2005, to October 23, 2006. He started working as a delivery driver and in March 2006 was promoted to the position of delivery manager. He was informed and understood that under the employer's work rules, the employer's vehicles and equipment were only to be used for business purposes. When a customer replaced an appliance and directed the delivery driver to haul away the old appliance, it was to be brought back to the employer's store. Customers, however, could direct the driver to haul the old appliance to the customer's garage or to the curb. There was no rule against a customer giving a driver or anyone else an old appliance as long as the driver picked up the appliance on his own time without the use of a company vehicle or equipment.

Sometime prior to March 2006, a customer informed the claimant that the old refrigerator-freezer he was replacing was in good working order and he did not think it should be scrapped. He asked the claimant whether he knew anyone who could use the appliance. The claimant told the customer that he could use the refrigerator at his cabin and the customer said the claimant was welcome to take the appliance. The claimant picked up the appliance when he was off duty and in his personal vehicle. He did not believe that he violated any work rule or disregarded any expected standard of conduct by taking the appliance. At the time, appliances were not in a secure area at the store, and anyone was allowed to pick up old appliances from the store and take them.

In October 2006, the employer received a tip that a delivery driver and his helper were seen using a Lowe's truck to haul several used appliances to their residence. When they were questioned by management, they justified their actions by informing the employer about the refrigerator the claimant had taken to his cabin and that the claimant had also supplied his brother with an old refrigerator that he had obtained from a customer. The allegation that the claimant had supplied his brother with an old refrigerator was false. The claimant was not aware of the actions of the delivery driver and his helper and never authorized the taking of used appliances from customer's homes using the employer's vehicles or equipment. When questioned, the claimant admitted that he had picked up a refrigerator from a customer's home on his own time using his own vehicle and denied getting a refrigerator for his brother's bar.

On October 23, 2006, the employer discharged the claimant because it believed the claimant had used a company vehicle to pick up used appliances while he was on duty and was dishonest in denying this conduct.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant's testimony was very credible and the employer's evidence to the contrary was hearsay from individuals who had reason to be untruthful. The conduct the claimant admitted to was not a violation of a work rule. No misconduct as defined by the unemployment insurance law has been established in this case.

DECISION:

The unemployment insurance decision dated November 15, 2006, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css