

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SILAS R LOMELINO
Claimant

LOWE'S HOME CENTERS LLC
Employer

APPEAL 18A-UI-07943-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/24/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Lowe's Home Centers, LLC (employer) filed an appeal from the July 16, 2018, reference 01, unemployment insurance decision that allowed benefits based upon the determination Silas R. Lomelino (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 15, 2018. The claimant participated personally and was represented by Christine Lomelino, his mother, who also testified on his behalf. The employer participated through Assistant Store Manager Josh Voelliger. No exhibits were offered into the record. The administrative law judge took official notice of the administrative record, specifically the fact-finding documents for purposes of determining whether the employer participated in the fact-finding interview.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Loader on the Front End beginning on April 22, 2017, and was separated from employment on June 13, 2018, when he was discharged. The employer has a policy prohibiting sexual harassment. The claimant received a copy of the policy and training regarding that policy at the beginning of his employment.

On May 21, 2018, two employees, TW and BS, reported to Assistant Store Manager Josh Voelliger, who was then the Human Resources Coordinator, that the claimant had made inappropriate sexual statements. TW reported that the claimant had told her he was bisexual and interested in relationships with fellow employees. She specifically mentioned BS. Voelliger met with BS who reported that the claimant asked to engage in oral sex with him while the two

were working. Voelliger reported these incidents to corporate Employee Relations per the employer's policy and practice. Nobody from the store spoke to the claimant about the situation and he was allowed to continue working.

On June 13, 2018, an Employee Relations representative conducted an investigation. The representative met with TW and BS as well as the claimant. The claimant denied the conduct occurred. The employer made the decision to discharge the claimant based on its investigation. The claimant had received two prior disciplinary actions, but they were not related to violations of the employer's sexual harassment policy.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$948.00, since filing a claim with an effective date of June 24, 2018, for the five weeks ending August 11, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32 provides, in relevant part:

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.

...

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

...

(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.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. As the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has not established that the claimant engaged in the conduct of which he was accused. The claimant credibly denied engaging in the conduct and the employer had no additional evidence than hearsay testimony from Voelliger as to the initial complaints. The employer did not provide any additional information about what information was gained during the investigation which led to the conclusion the claimant engaged in misconduct.

In the alternative, had the employer established that the claimant engaged in the conduct of which he was accused, it was no longer a current act by the time the claimant was discharged. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an

employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In this case, the allegations were reported on May 21, 2018 and no one spoke to the claimant about the incidents until he was discharged on June 13, 2018. The claimant was allowed to continue working during that three and a half week time period.

The employer did not establish that the claimant engaged in a current act of disqualifying misconduct. Benefits are allowed. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The July 16, 2018, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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