

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**THOMAS S DIXON**  
Claimant

**APPEAL NO: 18A-UI-08667-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LOWE'S HOME CENTERS LLC**  
Employer

**OC: 07/22/18  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
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:**

The employer filed an appeal from the August 8, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 5, 2018. The claimant participated. The employer participated through Julie Stephens, human resources manager.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did the claimant voluntarily quit the employment with good cause attributable to the employer?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any 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 customer service associate in the electric department, and was separated from employment on July 23, 2018, when he was discharged.

The employer has a written policy which tracks discipline (including attendance infractions) on a point system. Upon receipt of 16 points, an employee can be discharged. The claimant's points that led to discharge were due to a combination of attendance infractions and warnings for unprofessional conduct. The claimant was aware of the employer's policies, including the employer's notification of absence policy related to tardies and absences.

Prior to discharge, the claimant received three documented warnings. The claimant was first issued a written warning on October 17, 2017 in response to attendance. The employer gave the claimant the warning based upon tardies and absences which occurred November 10, December 6, 7, 2016, January 4, 5, 15, 29, April 5, June 27, July 1, 2, 20, 25, August 24, September 19, 20, 27, October 1, 3, 9 and 13, 2017 (Stephen's testimony). The absences were properly reported and all but two were reportedly due to illness. The claimant also had two absences related to flat tires. The claimant was given a second warning on November 27, 2017, for unprofessional conduct, after he startled an employee and customer while yelling (Stephen's testimony). A third warning was issued on June 14, 2018 in response to the claimant reportedly kicking boxes down an aisle while upset, and for having an emotional outburst in the break room (Stephen's testimony).

The employer indicated the claimant was also absent or tardy on December 18 and 19, 30, 2017, March 13 and June 15, 2018. The last warning for attendance given to the claimant was October 17, 2017. Then on July 7, 2017, the claimant was 29 minutes late to his shift when he had a flat tire. He called the employer and spoke to a manager to let him know he would be late. The claimant continued to work for two weeks, without indication that his employment was in jeopardy. The employer delayed discharging the claimant for two weeks to obtain required signatures and to ensure the store manager was on site to conduct the discharge. The claimant was not informed his job was in jeopardy during this period.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,374.00, since filing a claim with an effective date of July 22, 2018. The administrative record also establishes that the employer did not participate in the August 7, 2018 fact-finding interview or make a witness with direct knowledge available for rebuttal. Claims Analyst Nicholas Passarello, was called and the Workforce advisor left a voicemail for him. He did not respond to the message and did not participate in the Appeals hearing to offer evidence regarding the fact-finding interview. No written statement or evidence was provided for the fact-finding interview in lieu of attending. Employer witness, Julie Stephens, had no other details available regarding employer participation.

#### **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 Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(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.

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 Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witnesses' interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for a current act of work-connected misconduct as defined by the unemployment insurance law.

Iowa Admin. Code r.871-24.32(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.

Employee misconduct must be a current act in order to deny unemployment benefits. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). This incident must occur within a reasonable period from the discharge date. A lapse of 11 days from final act until discharge when claimant was notified on fourth day that his conduct was grounds for dismissal did not make final act a "past act". *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). The issue is when the employer learned of the current act and did it act to terminate the individual within a reasonable period of time.

The credible evidence is the employer was aware of the claimant's conduct on July 7, 2018, when he reported he would be tardy due to a flat tire. This was the final act that led to the decision to discharge him. However, he was permitted to continue working for over two weeks until discharge, unaware that the employer was planning to discharge him. The employer cannot on one hand argue that the conduct was so egregious that it warranted discharge instead of a lesser penalty, but then allow the claimant to continue working for over two weeks before determining he should be discharged. The reason for the delay was to allow multiple signatures to be collected and to make sure the manager was at the store on the day of termination. Consequently, 16 days passed from the final act until separation, making the final incident no longer current. In this case, the administrative law judge concludes the employer has failed to meet its burden of proof in establishing a current act of disqualifying job-related misconduct. As such, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because benefits are allowed, the issues of overpayment and chargeability are moot.

**DECISION:**

The August 8, 2018, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn