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

JEFFREY TJADEN
Claimant

APPEAL NO. 06A-UI-11745-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWES HOME CENTERS INC
Employer

**OC: 11-05-06   R: 03
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 28, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 21, 2006. The claimant participated in the hearing.   Sue Ramirez, Store Manager and Angel Malendez, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time sales specialist for Lowe's Home Centers from August 29, 2005 to November 6, 2006. On October 19, 2006, the claimant received his first written warning for leaving early without notifying the employer. He was upset his supervisor issued the warning and told another employee, "The fucking bitch wrote me up."   On November 1, 2006, the supervisor asked the claimant to do his daily due file. Another employee told the supervisor that the claimant called her a "dumb dyke" behind her back and the supervisor reported the situation to the employer. The claimant denies ever calling his supervisor by that name and when he was called into the office later that day he believed the employer was talking about the October 19, 2006, incident and admitted making that comment. Neither party actually stated what specific comment they were referring to. After speaking to the corporate office the employer terminated the claimant's employment. It chose not to warn him because it believed his comments were related to his "on-going anger" about the written warning and that consequently his comments were not made in the heat of the moment.

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.

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 proving disqualifying misconduct. 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). While the claimant admits he told another employee, "The fucking bitch wrote me up" regarding the October 19, 2006, warning, he credibly denied that he told another employee that his supervisor was a "dumb dyke" November 1, 2006. When the claimant was called into the office November 1, 2006, and was told he used improper language, he believed the employer was referring to the October 19, 2006, incident and admitted making that comment, not realizing the employer believed he was referring to the November 1, 2006, report. The claimant was the only person present in the hearing who was present when the first comment was made October 19, 2006, or when the alleged comment was made November 1, 2006. Consequently, the administrative law judge must give more weight to the claimant's testimony and, therefore, concludes that the claimant's comment to his co-worker November 19, 2006, was an isolated incident of poor

judgment and the November 1, 2006, comment cannot be substantiated, and as such his conduct does not rise to the level of disqualifying job misconduct as defined by Iowa law. Benefits are allowed.

DECISION:

The November 28, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/css