

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RANGER W COUNTRYMAN
Claimant

APPEAL 19A-UI-10064-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS LLC
Employer

**OC: 11/17/19
Claimant: Respondent (2)**

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:

On December 19, 2019, Lowe's Home Centers, LLC (employer) filed an appeal from the December 12, 2019 (reference 01) unemployment insurance decision that determined Ranger Countryman (claimant) was eligible to receive unemployment insurance benefits.

A telephone hearing was held on January 15, 2020. The parties were properly notified of the hearing. Employer participated by Store Manager Chris Ditsworth. Claimant registered a number for the hearing but was not available at the time of the hearing.

Employer's Exhibits 1-4 were admitted. Official notice was taken of claimant's payment history on the unemployment insurance system. Official notice was also taken of the administrative record, including the fact-finding worksheet.

The administrative law judge notes claimant submitted a request for postponement prior to the hearing. It was received by the Appeals Bureau on January 10, 2020. Claimant wrote the reason for the request was because he had contacted an attorney and needed time to prepare for the hearing. Claimant did not indicate his future availability in the request. It is this administrative law judge's practice to have Appeals Bureau staff contact the party making the request for postponement to inquire as to when the party is available for a rescheduled hearing. This is to ensure a hearing is not rescheduled for a time when the party requesting the postponement is unavailable. Appeals Bureau staff attempted to contact claimant to inquire as to when he would be available for a rescheduled hearing. However, Appeals Bureau staff were unable to reach claimant. As claimant was registered for the hearing, the administrative law judge intended to address claimant's request for postponement at the time of hearing. However, as noted above, claimant was not available at the number he registered at the time of the hearing and did not call in during the hearing to participate.

ISSUE(S):

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

II. Was the claimant overpaid benefits? Should claimant repay benefits or should employer be charged due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time Department Supervisor. Claimant's first day of employment was April 16, 2007. The last day claimant worked on the job was November 15, 2019. Claimant's immediate supervisor was Tonja Bryant. Claimant separated from employment on November 15, 2019. Claimant was discharged by Ditsworth on that date.

Ditsworth discharged claimant due to safety violations. The safety violations came to Ditsworth's attention on November 7, 2019, when a coworker reported claimant had violated safety procedures that day. Employer has a policy that requires employees to use an aisle blocker and spotters when using power equipment above the retail level, or eight feet off the floor. Exhibit 2. The policy is meant to protect employees and customers from the power equipment or stock falling and potentially injuring them.

The coworker reported she was working with claimant and saw him using power equipment above the retail level without blocking the aisle. Customers were nearby when this was happening. An investigation was undertaken, including gathering written statements from the coworker and claimant. Exhibit 1. Claimant stated he believed he was under eight-feet but also acknowledged he should have had a spotter and blockers. Claimant was or should have been aware of how high he was, as the eight-foot mark is delineated in the aisles and includes anything above the selling level, where customers can generally reach items.

Claimant did not have any previous safety violations. However, Ditsworth determined the violation was egregious enough to warrant immediate termination. This is because claimant had worked in the store for over ten years; was a supervisor; had been trained on the safety procedures; and was himself a power equipment trainer. See Exhibits 3, 4. As such, claimant was aware of the safety rules but intentionally chose not to follow them. Ditsworth also determined the violation warranted termination because it was a safety violation that could have resulted in serious injury to a customer or employee.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$481.00 for a total of seven weeks, beginning the week of November 23, 2019 and continuing to January 4, 2020. The total amount of benefits paid to date is \$3,367.00.

The employer did not participate in the fact-finding hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the December 12, 2019 (reference 01) unemployment insurance decision that determined claimant was eligible for benefits is REVERSED. Claimant is not eligible for benefits effective November 15, 2019.

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

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.

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).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc.*

v. Emp't Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997). “[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant.” *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Employer has carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). Claimant intentionally violated a known rule. While claimant had no previous violations of a similar nature, this violation was egregious given his knowledge and experience and the potential repercussions of his actions. Deliberately failing to follow the safety rule constituted a willful or wanton disregard of employer’s interest and was substantial job-related misconduct.

II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual’s separation from employment.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) “Participate,” as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer’s representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such

rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$481.00 for a total of seven weeks, beginning the week of November 23, 2019 and continuing to January 4, 2020. The total amount of benefits paid to date is \$3,367.00. Because the administrative law judge now finds claimant is disqualified from receiving benefits effective November 15, 2019, claimant has been overpaid benefits in the amount of \$3,367.00.

However, because employer failed to participate in the fact-finding interview within the meaning of Iowa Admin. Code r. 871-24.10 and the overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment, benefits shall not be recovered from claimant.

DECISION:

The December 12, 2019 (reference 01) unemployment insurance decision is REVERSED. Claimant is disqualified from receiving benefits until he earns wages for insured work equal to ten times the weekly benefit amount and meets all other eligibility requirements. Claimant has been overpaid benefits but those benefits shall not be recovered from claimant, due to employer's failure to participate in the fact-finding hearing.

Andrew B. Duffelmeyer
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Decision Dated and Mailed

abd/scn