

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASON LOVING**

Claimant

**APPEAL NO. 06A-UI-11199-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LOWE'S HOME CENTERS INC**

Employer

**OC: 10/22/06 R: 04  
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Lowe's Home Centers, Inc. (employer) appealed an unemployment insurance decision dated November 14, 2006, reference 01, which held that Jason Loving (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 6, 2006. The claimant participated in the hearing. The employer participated through Trisha Tennes, Human Resources Manager; Mark Klein, Store Manager; and Eric Rutledge, Loss Prevention. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time department manager of hardware and tools from May 10, 2003 through October 16, 2006 when he was discharged for violation of the employer's policies and failure to follow directives. He was responsible for completing cycle counts on a weekly basis. This is a type of inventory control in which the quantity of products in the store is compared to computer records. He received an initial warning on May 19, 2006 for failing to do his cycle counts for the week of May 5, 2006. This is a violation of the employer's human resource policy 315 which includes unproductive behavior, inefficiency and/or negligence in the performance of assigned duties. A written warning was then issued on June 20, 2006 for the same violation except in this situation, the claimant was found to be falsifying the cycle count process. The loss prevention department tracks cycle counts and a loss prevention specialist detected the claimant falsifying his count based on the fact that he completed it within ten minutes. His actions resulted in a financial loss for the employer.

The claimant was placed on a final written warning on September 27, 2006 for violating policy by smoking in unauthorized areas at unauthorized times. Smoking is not permitted on the premises, whether it is indoors or outdoors. A member of management witnessed the claimant

smoking a cigarette in a shed outside the lumber doors. He was on the clock and wearing his company vest at the time. The claimant accepted this warning as he acknowledged in the hearing that he had violated this policy several times because he was addicted to cigarettes. He was advised any further violations could result in disciplinary action up to and including termination. Cycle counts are not completed when the employer is completing inventory. Loss prevention determined that subsequent to inventory, the claimant had failed to do his cycle counts for five weeks in a row through October 4, 2006. Additionally, he was directed to complete an energy event ad and told management that he had completed it but had not done so. The employer discharged the claimant on October 16, 2006.

The claimant filed a claim for unemployment insurance benefits effective October 22, 2006 and has received benefits after the separation from employment.

### **REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 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 claimant was discharged for violation of company policy and failure to follow directives. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The claimant admitted violating the smoking policy numerous times and admitted failing to complete his cycle counts but contends it was not five weeks in a row. He argued that he did not have enough employees but had seven employees assigned to him. He then argued these employees could not perform their job duties but only one employee was on job restrictions. The claimant's violation of known work rules was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The unemployment insurance decision dated November 14, 2006, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,670.00.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

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