

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOEL R KULMAN
Claimant

APPEAL NO. 13A-UI-07204-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 05/05/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from representative's decision dated June 11, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on July 23, 2013, by telephone conference call. The claimant participated personally. The employer participated by Dan Gerovac, department manager. The record consists of the testimony of Dan Gerovac; the testimony of Joel Kulman; and Employer's Exhibits 1-10.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a chain of home improvement stores. The claimant worked in the employer's distribution center, which is located in Shelby, Iowa. The claimant was hired on January 21, 2008. He was a full-time general laborer. His last day of work was April 5, 2013. He was terminated on April 5, 2013.

The claimant was terminated for low productivity. There was not one specific incident that led to the claimant's termination. For the two weeks prior to his termination, the claimant failed to meet the employer's goal by 60 percent to 70 percent. The claimant had received written and verbal warnings concerning his low productivity. The claimant was given additional training and supervision in order to help him meet his goals. The claimant was trying his best to perform to the employer's satisfaction but was unable to meet his goals.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes unsatisfactory performance due to incapacity or inability. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The claimant was terminated for what the employer deemed to be low productivity. From the employer's perspective the claimant chose to not meet department goals. After carefully considering all of the evidence, the administrative law judge concludes that the claimant did not have the ability or capacity to perform in a satisfactory manner. He continued to have poor performance even after retraining and supervision. The claimant testified that he tried his best but was unable to meet the set goals.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting

the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). The claimant did attempt to perform the job to the best of his ability but was unable to meet the employer's expectations. No intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The decision of the representative dated June 11, 2013, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant meets all eligibility requirements.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs