

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JOHN H SCHILD
2096 – 175TH ST
FT DODGE IA 50501

MENARD INC
ATTN JAMES L MCMENOMY
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Appeal Number: 04A-UI-01142-CT
OC: 12/21/03 R: 01
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Menard, Inc. filed an appeal from a representative's decision dated January 26, 2004, reference 01, which held that no disqualification would be imposed regarding John Schild's separation from employment. After due notice was issued, a hearing was held by telephone on March 3, 2004. Mr. Schild participated personally and was represented by Monty Fisher, Attorney at Law. The employer participated by Steve Sargent, General Manager; James Teichmeier, Assistant General Manager; and Ashley Ewing and Jessica Taylor, Cashiers. The employer was represented by James McMenomy, Attorney at Law. Exhibits One through Four were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Schild was employed by Menard, Inc. from October 11, 2001 until December 24, 2003. He was last employed full time in building material sales. On December 20, 2003, Jessica Taylor advised James Teichmeier that Mr. Schild had touched her inappropriately. Ms. Taylor was standing by register 14 waiting to relieve Ashley Ewing for break when Mr. Schild came to the register. Ms. Taylor felt his hand brush against her buttocks and believed he had touched her inadvertently while trying to put something in the garbage can. A few seconds later, his hand again brushed against her buttocks. Because she believed he had intentionally touched her the second time, she told him to stop or she would report him for harassment. Mr. Schild then grabbed her on the buttocks, smiled, and walked away. The incident was witnessed by Ms. Ewing. Ms. Taylor immediately reported the incident to Mr. Teichmeier as he walked past the register. There was no history of animosity or conflicts between Mr. Schild and either Ms. Taylor or Ms. Ewing.

When she spoke with the employer regarding the incident, Ms. Taylor also relayed the fact that Mr. Schild had touched her inappropriately earlier in the day. She had been at the fountain filling a water bottle when he put one of his hands on each side of her waist and squeezed her. He then proceeded into the restroom. She did not complain to anyone at that point. As a result of his conduct of December 20, Mr. Schild was discharged on December 24 as his conduct was in violation of the employer's policies.

Mr. Schild has received a total of \$3,074.00 in job insurance benefits since filing his claim effective December 21, 2003.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Schild was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Schild was discharged for touching a female coworker inappropriately in violation of a known company policy. The video surveillance tape, Exhibit Four, has been reviewed several times by the administrative law judge. The quality of the taping, the lack of adequate lighting of the parties, and the angle of the camera makes it difficult to discern what is actually happening at register 14. The administrative law judge finds that the tape neither refutes nor substantiates the employer's contentions as to what occurred on December 20.

Ms. Taylor was credible in her testimony regarding what occurred on December 20, both that morning as well as that evening. Her credible testimony regarding what occurred that evening is bolstered by the fact that Mr. Schild had touched her inappropriately earlier in the day. The fact that he again touched her on the buttocks after she asked him to stop persuades the administrative law judge that the touching was intentional. Even if he touched her accidentally the first two times, the fact that he again touched her after she asked him to stop is evidence of his intent. Mr. Schild knew or should have known that his conduct was contrary to the standards the employer expected of him. His conduct had the potential of subjecting the employer to legal liability for sexual harassment. For the reasons stated herein, the administrative law judge concludes that the employer has satisfied its burden of proving disqualifying misconduct. Accordingly, benefits are denied.

Mr. Schild has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code Section 96.3(7).

DECISION:

The representative's decision dated January 26, 2004, reference 01, is hereby reversed. Mr. Schild was discharged by Menard, Inc. for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Schild had been overpaid \$3,074.00 in job insurance benefits.

cfc/b