

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW D KELLEY
Claimant

APPEAL NO. 08A-UI-00723-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 04/08/07 R: 04
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Matthew Kelley, filed an appeal from a decision dated January 15, 2008, reference 05. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on February 18, 2008. The claimant participated on his own behalf and was represented by Robert Johnson. The employer, Menard, Inc., participated by Assistant General Manager Connie Smith and was represented by Erik Fern. Exhibits One, Two, Three and Four were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Matthew Kelley was employed by Menards from July 3 until December 7, 2007, as a part-time hardware associate. He received a copy of the employee handbook which sets out the zero-tolerance policy for sexual harassment.

On December 3, 2007, Assistant General Manager Connie Smith received a report from another employee, Corey, which alleged the claimant had asked him for the telephone number of a female cashier. Ms. Smith and Department Manager Carl Droste talked with Mr. Kelley and told him it was inappropriate to be asking for personal information about other employees. The claimant denied he has asked for the cashier's phone number from Corey or anyone else.

On December 7, 2007, Assistant Department Manager Nate Schnedler came to Ms. Smith and asked, "What are we going to do about Matt?" Mr. Schnedler stated the previous day he had been giving orientation to a new employee, Kim, and the claimant had been following them around when he had been given other work to do. Ms. Smith talked with Kim who said the claimant had asked if she wanted him to follow her home, or take her home, the day before.

The employer met with the claimant about these allegations. Mr. Kelley admitted he had asked Kim if she wanted him to follow her home or give her a ride home because it had been snowing

the day before and he had a four-wheel drive vehicle and she did not. He denied following her and Mr. Schnedler around but had only approached his assistant department manager for new assignments when he had completed the previous one.

Mr. Kelley was discharged for violation of the zero-tolerance sexual harassment policy by Ms. Smith on December 7, 2007.

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). In the present case the employer has presented nothing but second-hand and third-hand allegations about the claimant's conduct. No one who allegedly made the reports or complaints participated in the hearing, or even provided written statements regarding the incidents.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with

employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of January 15, 2008, reference 05, is reversed. Matthew Kelley is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css