

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEFFREY P MARK
Claimant

MENARD INC
Employer

APPEAL 19A-UI-07215-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/11/19
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the September 5, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was originally scheduled for October 3, 2019 at 1:00 p.m. Employer requested a continuance because claimant had not received its proposed exhibits, which were sent via FedEx. A continuance was granted so the proposed exhibits could be sent to claimant via email. The hearing was continued to October 4, 2019 at 8:00 a.m. Both parties waived 10-day's notice of the hearing. A hearing was held on October 4, 2019, at 8:00 a.m. Claimant participated. Employer participated through its attorney, Paul Hammell. Tucker Wentzien, Assistant General Manager, was a witness for employer. Employer's Exhibits 1 – 10 were admitted.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying, job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was a sales associate from February 9, 2016 until his employment with Menard, Inc. ended on July 9, 2019. (Wentzien Testimony) Claimant began as a full-time employee, but was a part-time employee at the time of separation. (Claimant Testimony) Ryan Low, Building Materials Department Manager, was claimant's direct supervisor. (Wentzien Testimony)

Employer has a regulation prohibiting theft, attempted theft, time theft, misuse or unlawful removal from premises of any company property and prohibiting selling or buying company merchandise or services at other than authorized prices. (Exhibit 4, p. 2) The regulation also states that violation may result in disciplinary action including termination. (Exhibit 4, p. 1) The regulation is included in the employee handbook. (Wentzien Testimony) Claimant received a copy of the employee handbook. (Exhibit 6; Claimant Testimony) Employer also has an extensive policy and procedure outlining how a price of an item will be lowered at a customer's request. (Exhibit 8) Before lowering a price, a sales associate must obtain approval from the

general manager or assistant general manager. (Exhibit 8, p. 2) Claimant knew the policy and procedure. (Wentzien Testimony)

On June 30, 2019, claimant purchased a door for a customer for the price of \$1.00. (Wentzien Testimony; Exhibit 2) Claimant had a personal relationship with the customer; the customer had provided claimant with a place to live. (Claimant Testimony) Claimant did not obtain approval to lower the price to \$1 from the general manager or assistant general manager. (Claimant Testimony) The price of the door was \$50. (Wentzien Testimony) The sale came to employer's attention when a manager reviewed all price-override purchases the following week. (Wentzien Testimony) On July 9, 2019, employer confronted claimant and gave claimant an opportunity to explain his actions. (Wentzien Testimony) Claimant responded that he was not aware of the policy and procedure for lowering prices. (Wentzien Testimony) Employer terminated claimant's employment on June 9, 2019 violation of employer's policy. (Wentzien Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for disqualifying job-related misconduct.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

- 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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). 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Reporting time on one's timecard when one is not working is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law.

It is the duty of the administrative law judge, as the trier of fact, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's version of events to be more credible than the claimant's version of those events. Specifically, I find claimant's testimony that he was not aware of the policy and procedure for lowering prices to lack credibility.

Claimant purchased an item for a guest with whom he had a personal relationship for 2% of the item's price without manager approval. Not only was claimant's conduct a violation of company policy – it was an act of theft. A company policy against theft is not necessary; honesty is a reasonable, commonly accepted duty owed to the employer. Claimant's theft was contrary to the best interests of his employer and a deliberate violation of the standards of behavior the employer had a right to expect of him. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The September 5, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Adrienne C. Williamson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

acw/rvs