

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NOLAN DREESMAN
Claimant

APPEAL NO: 09A-UI-18038-E

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 10-04-09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 17, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 2, 2010. The claimant participated in the hearing. Brian Sampson, General Manager and Maureen Cosgrove, Attorney for the Employer, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time garden center specialist for Menards from October 2, 2008 to September 27, 2009. He was discharged for excessive unexcused absenteeism. The employer's policy assesses one point for each incident of absence or tardiness and works on a 90-day rolling attendance calendar (Employer's Exhibit Three). Occurrences drop off after 90 days (Employer's Exhibit Three). The first through third absences result in two verbal warnings and a written warning, the fourth results in suspension and the fifth results in termination. "Disciplinary action, at the unit manager's discretion, will be taken based on the number of times a Team Member is absent or late beyond the five (5) minute grace period" (Employer's Exhibit Three). Employees may also be terminated at the manager's discretion. The claimant was absent May 24, 2009, and received one point and a verbal warning (Employer's Exhibit Five). His mother was in the hospital in Ames and he forgot to obtain a doctor's note. The claimant was absent May 30, 2009, and received one point and a written warning (Employer's Exhibit Five). His mother was experiencing chest pains so he went to Ames. The claimant was tardy August 9, 2009, and received one point (Employer's Exhibit Five). The claimant was absent September 26, 2009, and called in to report he was ill but did not have a doctor's excuse and received one point and written warning (Employer's Exhibit Five). On September 27, 2009, the claimant reported to work on time and the employer reviewed his previous 90-day attendance history and notified the claimant his employment was

terminated for excessive unexcused absenteeism (Employer's Exhibit Five). The employer testified the claimant was tardy September 27, 2009, but the employer did not have any paperwork to support its claim. The claimant's signature only appears on the May 24, 2009, verbal warning and May 30, 2009, written warning as well as the termination document (Employer's Exhibit Five).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In this case it appears the employer failed to follow its attendance policy in disciplining the claimant regarding his attendance and included May 24 and May 30, 2009, which were outside the 90-day period, and a phantom incident of tardiness September 27, 2009. The 90-day period for the May 24, 2009, absence ran August 22 and the 90-day period for the May 30, 2009, absence ran August 28, 2009. The employer's policy states it looks back 90 days when counting absences. In looking back 90 days from September 27, 2009, the date would be June 30, 2009, so the May 24 and 30, 2009, absences should not have been counted. Additionally, there is no evidence showing the claimant received the warnings of August 9 or September 26, 2009. Under these circumstances the

administrative law judge concludes the employer did not follow its attendance policy in terminating the claimant's employment and only the August 9 and September 26, 2009, absences should have been counted. Therefore, benefits are allowed.

DECISION:

The November 17, 2009, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css