

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**CALVIN M KENNEDY**  
Claimant

**MENARD INC**  
Employer

**APPEAL 16A-UI-11145-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/18/16**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the October 11, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 31, 2016. The claimant participated personally. The employer participated through Brian Sampson, general manager. Claimant exhibit A and employer exhibits 1 through 7 were admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an assistant mill work manager and was separated from employment on September 21, 2016, when he was discharged for falsification of his time card (employer exhibit 1).

The employer tracks employees' timekeeping by way of employees swiping their badge at their work station prior to and upon completion of a shift. If an employee needs an adjustment to the recorded time, they are permitted to complete a punch verification form. The claimant also received access to employer policies which state that falsification of company documents can result in discipline (Employer exhibits 4 and 5) As an assistant manager, the claimant was trained on these employer policies, as well as enforced them amongst his subordinates.

Prior to discharge, the claimant had no warnings for falsification of any documents or dishonesty. The claimant did have multiple warnings related to his attendance (Employer exhibit 7), and acknowledged he had been suspended three times for chronic tardiness to shifts. Per the employer's attendance policy, if an employee is more than 5 minutes late to his shift, he will receive attendance infraction points, which can result in warnings and discharge (Employer exhibit 6).

The final incident occurred on September 18, 2016 when the claimant arrived late to his 10:00 a.m. shift. The undisputed evidence is the claimant was not on time to his shift, but the evidence is disputed whether the claimant arrived to the premises at 10:04:38 a.m. or 10:05:05 a.m. (Employer exhibit 5). Once the claimant would enter the premises, he would walk down two store aisles before reaching the station to clock in. The claimant estimated it took about a minute to complete the walk, without interruption. On September 18, 2016, when the claimant clocked in, the timekeeping station reflected 10:08 a.m. (employer exhibit 2) The claimant would have received two attendance points for being more than five minutes late and would have been issued another written warning for his tardiness. However, the claimant submitted a punch verification form to modify his start time to 10:05 a.m., (employer exhibit 3) which meant he would not receive attendance points for his tardy.

Upon receiving the punch verification report, the employer initiated an investigation. By way of surveillance video footage, the claimant entered the building at 10:05:05 a.m. (Employer exhibit 5). The claimant walked through the two aisles and was viewed at the end of the second aisle at 10:06:31 (employer exhibit 5). No customers are viewed in any of the five still photos furnished with the employer (Employer exhibit 5). The claimant's work station where he clocked in was not within view of the camera angle and was beyond the two aisles recorded. Per the employer's timekeeping system, the claimant did not arrive to the store until 10:05:05 and clock until 10:08 a.m.

The claimant acknowledged that he was running late, as he often did, and arrived at 10:04:38 a.m. He further asserted that he would have had made it to the clock in station at the back of the store by 10:05 a.m. if he had not been stopped by a customer, which is why he submitted a request to change his start time. The claimant reported the customer was not seen in the surveillance footage because he saw the claimant after he finished walking through the second aisle (where footage ended) but before the claimant made it to his work station (off site from the camera). Upon completion of investigation, the claimant was discharged.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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

### **871—24.32 Discharge for misconduct.**

#### **24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, 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 believable evidence; 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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The credible evidence presented is that the claimant had a documented history of discipline related to continued tardiness (Employer exhibit 7). By the claimant's own admission, he frequently ran late, but knew that he had a five minute grace period to arrive and be clocked in before he was disciplined for being late. There is no question the claimant was late to his shift on September 18, 2016. The preponderance of the evidence does not support the claimant's assertion that 10:05 a.m. was the correct start time for him, as he recorded and requested in the punch verification form (Employer exhibit 3).

At issue is the credibility of the claimant's assertion that he would have made it to timekeeping station but for a customer stopping him. The claimant's motivation to adjust the time even by a minute or two would have been to avoid further discipline for tardiness because the employer allows a five minute grace period (Employer exhibit 6). It cannot be ignored that in each of the still images presented of the claimant throughout the store, that there is no customer (or any other person) in sight and per the claimant's explanation, the customer appeared just after the surveillance footage ended. Regardless if the administrative law judge accepts the claimant's explanation that the customer delayed him until 10:08 a.m., the evidence does not support the claimant's assertions that he would have been clocked in by 10:05 a.m. but for the customer stopping him.

Even if the claimant's calculations are used;(instead of the employer's) that he entered the store at 10:04:38 and not 10:05:05, the claimant could not have arrived to his work station before 10:06 a.m on September 18, 2016. A careful review of the surveillance footage shows that over one and one half minutes elapsed before the claimant made it to the end of the aisle, meaning even if he had not been stopped, he still had further distance to go, and had not made it to the work station before 10:06 a.m. At the earliest, even by using the claimant's calculations, which

are thirty seconds behind the employer's, he was still in the second aisle at 10:06:04 and not yet to the clocking in station. Therefore, the request to adjust his start time to 10:05 a.m. was not accurate.

Honesty is a reasonable, commonly accepted duty owed to the employer. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for reasons that would constitute misconduct, even without prior warning for similar conduct. Benefits are denied.

**DECISION:**

The October 11, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs