

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN M PETERSON
Claimant

APPEAL NO. 09A-UI-10928-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

**Original Claim: 06/21/09
Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Menard, Inc. (employer) appealed a representative's July 23, 2009 decision (reference 01) that concluded Brian M. Peterson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on August 25, 2009. The claimant participated in the hearing. Jason Kuiper, attorney at law, appeared on the employer's behalf and presented testimony from four witnesses: Tyron Jones, Kent Alexander, Melissa Woodward, and Ryan Wilkening. Based on the evidence, the arguments of the parties, 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 work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 11, 2004. Since approximately June 2008 he worked full-time as a delivery coordinator at the employer's Altoona, Iowa store. His last day of work was June 24, 2009. The employer discharged him on that date. The stated reason for the discharge was violation of the employer's sexual harassment and discrimination policy.

The employer has a practice of having zero tolerance on sexual harassment and discrimination, of which the claimant was on notice. The claimant was in the habit of making sexually oriented comments to other male employees, particularly Mr. Alexander, an assistant building materials manager whose desk neighbored the claimant's desk. Most of the claimant's sexually oriented comments focused on Ms. Woodward, a human resources coordinator. The claimant made frequent comments in reference to Ms. Woodward, including comments about her wearing tight short shorts, querying whether she was wearing underwear, and statements about seeing her breasts when she lifted her arm. He made comments about seeing a woman who looked like

Ms. Woodward outside a porn shop. One of the final incidents was in speaking to Mr. Alexander, pointing at Ms. Woodward and then licking his fingers.

Mr. Alexander had frequently responded to the claimant that he should not be talking about Ms. Woodward like that. While Mr. Alexander was an assistant manager, he was not in a position of authority over the claimant. When the frequency and the type of comments increased and became more offensive, Mr. Alexander felt he could no longer tolerate the comments himself. He spoke to Ms. Woodward to inquire whether she would find those types of comments offensive. When she responded that she did, Mr. Alexander went to Mr. Jones on June 22 to report the conduct. As a result of the report and the employer's investigation, which substantially confirmed the report, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective June 21, 2009. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

In order to create a sexually hostile work environment, it is not necessary that the subject of the comments be aware of the comments; it is sufficient that the comments were made to anyone on the workplace. The claimant's making of the offensive, sexually-oriented comments to a coworker about another coworker shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be

recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's July 23, 2009 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of June 24, 2009. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw