

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

CHRISTINE A KEMPER
PO BOX 822
601 – 3RD ST
DURANT IA 52747

MENARD INC
1903 PARK AVE
MUSCATINE IA 52761

Appeal Number: 04A-UI-02906-DT
OC: 02/15/04 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Menard, Inc. (employer) appealed a representative's March 9, 2004 decision (reference 02) that concluded Christine A. Kemper (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 April 6, 2004. The claimant participated in the hearing. James McMenomy, Attorney at Law, appeared on the employer's behalf and presented testimony from one witness, James Gabel. During the hearing, Employer's Exhibits One and Two were entered into evidence. 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 September 28, 1998. She worked full time as a commercial contractor sales representative in the employer's Muscatine, Iowa home improvement center. Her last day of work was February 13, 2004. The employer discharged her on that date. The reason asserted for the discharge was having a conflict of interest and shopping while on the clock.

The claimant was having a commercial contractor remodel her home. The contractor was buying most or all of the supplies at the employer. On February 11 there was some problem with some of the insulation the contractor had gotten, so the claimant made arrangement for some more insulation and a door to be loaded onto the employer's truck that she drove on her daily sales calls. The claimant paid for the merchandise personally at approximately 7:00 a.m.; her work shift had begun at 6:30 a.m. During the day she made a trip to her home to deliver the items to the contractor, which took approximately an hour of her time. The trip to her home took her outside her assigned sales zone. Mr. Gabel, the assistant general manager, became aware of the transactions that day because the person whom the claimant had asked to load the merchandise onto her truck had problems loading the door onto the truck. The employer then began to analyze the claimant's log sheets. It discovered there had been merchandise returns on the commercial contractor's account made after a trip to the claimant's home on February 9 and another trip to her home on January 30.

The employer's policies provide that "Team Members' purchases must be made on their own time (i.e. before or after their shift or during their unpaid break)." There are also provisions prohibiting commercial contractor sales representatives from engaging in joint ventures or having a business interest with a commercial contractor. The employer viewed the claimant's purchase of the merchandise to be used by the contractor at the claimant's home to be a violation of the prohibition against making purchases on their own time; the claimant made the transaction herself thinking that since the contractor could have made the purchase himself and then passed the cost on to her, she was just making the payment herself as a convenience to the contractor. The employer viewed the claimant's use of the truck to deliver the merchandise as using company property for her own benefit; the claimant acknowledged that deliveries were usually not supposed to be made in the sales trucks, but rather by an outside delivery service; but she knew that the trucks could also be used to deliver merchandise to a contractor where there had been a problem with a prior delivery, which she considered to be the case in this instance. The employer's greatest and underlying concern, however, was that the claimant was utilizing her position with the employer to benefit herself in her home remodeling arrangement with the commercial contractor. The claimant understood that if she had an interest with a commercial contractor in new construction on speculation, that would be an unacceptable conflict of interest, but she understood that the concern did not extend to home remodeling project or perhaps not even to new home construction where the home was far enough along at the time of purchase by the employee. She viewed her provision of services to the commercial contractor who was doing the work on her home the same as if she were providing those services to a contractor doing similar work on another home, with the exception of paying for the merchandise directly on the one occasion. Finally, she understood that her immediate supervisor was aware of what she was doing and had implicitly approved that her activities were not inappropriate, particularly as there were other employees who had engaged in comparable activities without repercussion.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 Section 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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her use of the employer’s truck and her time in purchasing and delivering merchandise for the remodeling of her home being done by a commercial contractor. While the administrative law judge is disturbed that even during the hearing, the claimant did not seem to comprehend the potential for abuse that her arrangement mixing her business and personal interests posed and what in the legal or judicial provision would be termed “an appearance of impropriety,” the administrative law judge declines to apply the same standard to a commercial contractor sales representative. Given the evidence that it had become a tacitly accepted practice for employees to engage in similarly “close” relationships with commercial contractors, it is fully understandable why the employer wished to make a concentrated effort to address this issue and more vigorously enforce its policies, even to the point of discharging the claimant for her activities. However, especially considering the prior practices and the claimant’s belief that she was operating with her supervisor’s implicit approval, under the circumstances of this case, the claimant’s conduct was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative’s March 9, 2004 decision (reference 02) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/b