

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

ALAN D MAKABI  
2715 Q AVE NW  
CEDAR RAPIDS IA 52405

MENARD INC  
2800 WILEY BLVD SW  
CEDAR RAPIDS IA 52404

Appeal Number: 04A-UI-03192-DWT  
OC 02/22/04 R 03  
Claimant: Respondent (2)

**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, 4<sup>th</sup> 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 are 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  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Menard, Inc., (employer) appealed a representative's March 17, 2004 decision (reference 01) that concluded Alan D. Makabi (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 14, 2004. The claimant participated in the hearing. Jennifer Giebel, attorney at law, represented the employer. Gus Gerken, the general manager, and Kimberle Clark, an assistant manager, testified on the employer's behalf. 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:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on April 13, 1994. Since June 19, 2003, the claimant worked at Gerken's store. The claimant worked full time as an assistant cabinet/appliance manager.

When the employer takes a used appliance from a customer, the employer sells the used appliance for \$69.00 or less because it is not under warranty and is not part of the employer's inventory. When a new appliance has been damaged, the employer may discount the appliance but the new appliance is not sold as a used appliance.

On February 8, 2004, the claimant removed a dishwasher from the sales floor and was taking it to the warehouse for a customer who planned to buy it and pick it up. While the claimant was moving the dishwasher, it accidentally fell off the dolly and was slightly damaged. The claimant put the dishwasher in the area for the customer to pick up on Sunday.

On Monday, February 9, the claimant noticed the customer had not picked up the dishwasher. After receiving a call from his wife about his mother-in-law's health, the claimant planned to leave for Missouri as soon as possible so his wife could be with her mother. The claimant's mother was scheduled for surgery. After the claimant talked to his wife, a contractor asked the claimant about a damaged washing machine that a delivery person had recently brought back to the store. The contractor wanted to buy the washing machine as a used appliance. Although the claimant knew he should not sell the damaged washing machine as a used appliance he did. When the contractor asked about the damaged dishwasher, the claimant also sold the slightly damaged dishwasher as a used appliance. The claimant wrote up the sale ticket for both items as used appliances. The claimant gave the contractor the two appliances for \$138.00 when the total retail value was over \$800.00.

The claimant was in Missouri on February 10 and 11. While the claimant was in Missouri, the employer looked for paperwork a delivery person had not turned in for the damaged washing machine. While trying to find out where the washing machine was at, the employer learned on February 10 that the claimant sold the washing machine to the contractor for \$69.00. The employer contacted the contractor about the washing machine. The contractor and employer resolved the issue of the washing machine before the claimant returned from Missouri.

When the claimant returned to work, the employer talked to him about the damaged washing machine. The claimant acknowledged he sold the washing machine as a used appliance. When the employer asked the claimant about the dishwasher, the claimant indicated he did not know how or why the dishwasher had been removed from the sales floor. On Monday, February 16, the claimant talked to Gerken and Clark about the two appliances. Again, the claimant failed to tell the employer that he had accidentally damaged the dishwasher while he was moving the dishwasher from the sales floor to the warehouse. The employer suspended the claimant to investigate the situation.

Between February 16 and 23, the employer reviewed the videotape and saw the claimant remove the dishwasher from the sales floor. On February 21, the claimant talked to Gerken again. The claimant still did not tell Gerken that he had removed the dishwasher from the sales floor. On February 23, 2004, the employer discharged the claimant for dishonesty and lack of integrity. After the employer told the claimant about the video that showed the claimant removing the dishwasher from the sales floor, the claimant acknowledged he moved it so a customer could pick it up on Sunday.

The claimant established a claim for unemployment insurance benefits during the week of February 22, 2004. The claimant filed claims for the weeks ending February 28 through March 20, 2004. He received his maximum weekly benefit amount of \$322.00 during each of these weeks.

#### REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant may have used poor judgment when he allowed a contractor to purchase two new but damaged appliances as used appliances for just \$69.00 a piece. On more than one occasion the claimant intentionally withheld information from the employer about the dishwasher. The claimant was not truthful when he told the employer he had no knowledge about how or why the dishwasher was removed from the sales floor. The claimant was not honest about what he had done with the dishwasher because he assumed the truth might get him into trouble. When the claimant made the decision to deny any involvement in removing the dishwasher from the sales floor, he committed work-connected misconduct. The claimant's decision to be less than honest with the employer establishes that he intentionally and substantially disregarded the employer's interests. As of February 22, 2004, the claimant is disqualified from receiving unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code §96.3-7. The claimant is not legally entitled to receive unemployment insurance benefits during the weeks ending February 28 through March 20, 2004. He has been overpaid a total of \$1,288.00 in benefits he received for these weeks.

#### DECISION:

The representative's March 17, 2004 decision (reference 01) is reversed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of February 22, 2004. This disqualification continues until he 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. The claimant is not legally entitled to receive benefits for the weeks ending February 28 through March 20, 2004. The claimant has been overpaid \$1,288.00 in benefits he received for these weeks.

dlw/kjf