

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LESTER SAMMONS
Claimant

MENARD INC
Employer

APPEAL 21A-UI-11676-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/29/20
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On April 20, 2021, claimant, Lester Sammons, filed an appeal from the March 9, 2021, reference 01, unemployment insurance decision that denied benefits based upon the determination that the employer, Menard, Inc., discharged claimant for theft. The parties were properly notified about the hearing held by telephone on July 14, 2021. The claimant participated personally, with his attorney, Casey Steadman. The employer participated through its attorney, Paul Hammell, with Chuck Dohnal as the employer's witness. Claimant's Exhibit A was admitted to the hearing record, as were Employer's Exhibits 1 through 5. Additionally, Department's Exhibit D-1 was admitted to the hearing record.

ISSUES:

Is the claimant's appeal timely?
Did the employer discharge claimant for 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 in electrical sales beginning on August 15, 2018, and was separated from employment on September 5, 2020, when he was discharged.

On August 31, 2020, the electrical manager, and claimant's direct supervisor, realized that a product—some conduits—were missing from the department. He investigated to see who bought them. When he looked into the matter, he discovered that claimant bought the product. He reviewed the video surveillance footage and saw claimant make a tag and attach it to the product. At the register, the product rang up at \$0.01 per piece, when it typically sold for \$24.00 per piece. Claimant bought 12 pieces, though two of the pieces had their price reduced by the department manager because they were bent. He also bought a number of other items during the transaction, which brought the total price to more than \$200.00. The cashier was having difficulty with the transaction, so the front end manager came over, swiped her badge to approve the transaction, and left. During the investigation into the incident, she told the

employer that she had not been paying attention when she approved the sale of the product for \$0.01 apiece.

The conduit had an open SKU attached to it, which is why it rang up at the price it did. It was not normal procedure for claimant, or someone in a position similar to claimant's, to put an open SKU on product. However, it was standard procedure for managers to do so, on occasion.

The employer conducted an investigation, and determined that claimant violated its policies. On September 5, 2020, Dohnal terminated claimant's employment. Shortly thereafter, claimant paid full price for all 12 pieces of product. The price for the product came to more than \$300.00.

A disqualifying decision was mailed to claimant on March 9, 2021. He believes he received the decision on March 12, 2021, and the same day, he went to the local Iowa Workforce Development office and submitted an appeal form. The staff person who received his appeal form stamped the form with a stamp indicating it had been received March 12, 2021. Thereafter, claimant called the Appeals Bureau to inquire about his appeal. The representative stated there was no record of his appeal. He went back to the local office and explained what happened. They faxed the appeal again. Ultimately, the Appeals Bureau acknowledged that it received both appeals on April 20, 2021.

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.

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part: "[u]nless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision."

Iowa Admin. Code r. 871—24.35(1) provides:

1. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

(a) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

(b) If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

(c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871—24.35(2) provides:

2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott* 319 N.W.2d 244, 247 (Iowa 1982).

The appellant filed an appeal in a timely manner but it was not received. This is evidenced by the stamp on the document indicating it was initially received on March 12, 2021, which is within the timely filing period. Immediately upon receipt of information that the appeal had not been received by the Appeals Bureau, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

Iowa Code § 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.

Iowa Admin. Code r. 871—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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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, 394–95 (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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events. Claimant testified that he simply did not pay attention to the price of the ticket when he purchased a number of products, including the conduit at issue, on August 31, 2020. However, this is not credible given the substantial difference between the purchase price and the price at which the conduit should have been sold. Claimant would have spent well over \$500.00 on August 31, 2020, even if two of the 12 pieces of conduit he purchased were discounted. He paid \$250.00 that day. Additionally, while the employer acknowledged it could not see the content of the sheet written out by claimant and affixed to the product, the testimony that he was observed doing so via surveillance footage is compelling.

The employer has demonstrated to the satisfaction of the administrative law judge that claimant engaged in disqualifying misconduct, even without prior warnings regarding similar conduct. Benefits are denied.

DECISION:

The March 9, 2021, (reference 01) unemployment insurance decision is affirmed. The appeal is timely. 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.



Alexis D. Rowe
Administrative Law Judge

July 27, 2021
Decision Dated and Mailed

ar/lj