

**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**

**Appeal Number: 04A-UI-06148-DT
OC: 05/09/04 R: 04
Claimant: Respondent (1)**

**SHAWN P TAYLOR
P O BOX 253
MUSCATINE IA 52761**

**MENARD INC
1903 PARK AVE
MUSCATINE IA 52761**

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 May 27, 2004 decision (reference 01) that concluded Shawn P. Taylor (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 June 28, 2004. The claimant participated in the hearing. James McMenemy appeared on the employer's behalf and presented testimony from two witnesses, Jody Martin and Mary Gray. 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. He worked full time as millwork manager in the employer's Muscatine, Iowa home improvement store. His last day of work was May 7, 2004. The employer discharged him on that date. The reason asserted for the discharge was time theft.

On April 29, 2004, the claimant suffered a work-related injury. He spoke with Ms. Gray in the employer's payroll department, and she arranged a doctor's appointment for him with the employer's workers' compensation doctor. She told him to clock out for his appointment, which he did. When he returned, he submitted to Mr. Martin, the general manager, a punch verification form that would seek pay for the time the claimant was at the doctor. This was the practice that had been followed by the prior general manager for work-related doctor's appointments. Mr. Martin advised the claimant that he was not entitled to regular pay for the time at the doctor, that he would have to obtain any pay for missed time through workers' compensation.

The claimant had a follow-up doctor's appointment on May 4, 2004. He failed to punch out before leaving. When he returned, he punched the time clock, but since he had failed to punch out when he left, his punch actually punched him out. When he realized this, he waited a minute, then punched back in and went to attend to a customer. Later that night the claimant again failed to punch out upon leaving. Because he had not punched out at the end of the day on May 4, he could not properly punch in on May 5. He did a punch verification form to indicate when he had left for the day on May 4; he forgot to also make a correction for the error in failing to punch out for the doctor's appointment. The employer concluded that the claimant had intentionally failed to punch out for his doctor's appointment on May 4 and had intentionally failed to do a punch verification form to correct the error, and so discharged him.

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 employer's reason for discharging the claimant was the conclusion he had intentionally left himself punched in to be paid for work time for which he was not entitled. Misconduct connotes volition. Huntoon, supra. While the timing of the occurrences provide some circumstantial possibility that the omission had been intentional, the implication on its own is not sufficient to overcome the claimant's testimony to the contrary that he did not intentionally fail to clock out or adjust his time; the employer has not established by a preponderance of the evidence that the claimant's actions were deliberate with the purpose of gaining the unearned pay. Under the circumstances of this case, the claimant's failure to clock out when he left for the appointment and his failure to do a correction when he returned was the result of

inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, 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 May 27, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/s