

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

JEFFREY C DUNCAN
1760 MICHIGAN DR
EVANSDALE IA 50707

MENARD INC
4777 MENARD DR
EAU CLAIRE WI 54703

Appeal Number: 05A-UI-00308-CT
OC: 11/28/04 R: 03
Claimant: Appellant (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 for Misconduct

STATEMENT OF THE CASE:

Jeffrey Duncan filed an appeal from a representative's decision dated January 4, 2005, reference 02, which denied benefits based on his separation from Menard, Inc. After due notice was issued, a hearing was held by telephone on January 24, 2005. Mr. Duncan participated personally and offered additional testimony from Ken Weidemeier, Assistant Store Manager. The employer participated by Brian Sampson, General Manager, and was represented by James McMenomy, Store Counsel.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Duncan was employed by Menard, Inc. from October 19, 1998 until November 29, 2004 as a full-time store associate. He was discharged because of comments he made to a female coworker.

On November 28, 2004, Rebecca, a coworker, came by Mr. Duncan while he was in his work area. He commented to her that she looked real nice, to which she replied, "thank you." Approximately one hour later, Rebecca was at the front end of the store working as a cashier when Mr. Duncan went to her register and told her that she looked very pretty. On another occasion that same day, he again went to Rebecca's register to comment on her looks. He told her that she was pretty enough to "make a rabbit spit in a bulldog's face." Rebecca felt uncomfortable with the comments and reported them to management. She also reported that she felt Mr. Duncan was leering at her. When confronted by management, Mr. Duncan acknowledged making the comments. As a result, he was discharged on November 29, 2004.

Mr. Duncan had been suspended from work for three days in January of 2003 because of complaints of unwanted touching and inappropriate comments. The specifics of his comments are unknown. He was advised at the time to limit his conversation to appropriate workplace subject matters. Mr. Duncan received another warning on July 26, 2004 because of reports that he was touching other individuals. He had been observed giving spinal manipulations to coworkers. The employer did not speak with any individuals who were offended by this practice. The warning advised Mr. Duncan to discontinue doing adjustments at work and to remain away from the front end of the store.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Duncan was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Duncan was discharged as a result of comments he made to Rebecca on November 28. He had previously been warned to limit his conversation to appropriate topics and to remain away from the front end of the store. If Mr. Duncan had made only the one comment to Rebecca while she was in his area, this would be a different matter. However, after already telling her that she looked nice, he made two trips to her register to tell her that she looked pretty. Mr. Duncan knew or should have known that approaching the same female on three occasions in one day to comment on her appearance might be perceived as a "come-on" or sexual harassment. After he had commented on Rebecca's appearance and she acknowledged his comment, there was no further need to comment on her appearance. There was certainly no need to make two trips to her register for the purpose of doing so.

Mr. Duncan had received prior warnings about inappropriate conduct in the workplace. Even if his past actions were totally innocent, the warnings served to put him on notice of the employer's expectations regarding his conduct. For the reasons stated herein, the administrative law judge concludes that disqualifying misconduct has been established and benefits are denied.

DECISION:

The representative's decision dated January 4, 2005, reference 02, is hereby affirmed. Mr. Duncan was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility.

cfc/sc