

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

NATHAN A KESSLER
Claimant

APPEAL NO. 11A-UI-16332-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 11/06/11
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Menard, filed an appeal from a decision dated December 12, 2011, reference 01. The decision allowed benefits to the claimant, Nathan Kessler. After due notice was issued, a hearing was held by telephone conference call on January 17, 2011. The claimant participated on his own behalf. The employer participated by Commercial Sales Manager Bob Bates, Assistant General Manager Mike Mrotek and was represented by Store Counsel Paul Hammell.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Nathan Kessler was employed by Menard from April 7, 2008 until November 1, 2011 as a full-time account service manager. His job entailed being out in a company vehicle two to three times per week calling on contractors to deliver material, check to see if they needed any new supplies. He signed an agreement which specifically forbids using the company truck to go to the employee's home, even for lunch breaks.

On October 28, 2011, the employer began an investigation of all account service managers who use company trucks because of reports of misuse by one such manager. They investigated Mr. Kessler's activities from October 7 through 28, 2011, using the GPS installed on the company vehicle. The investigation revealed he had stopped at his home every day while he was on the road and frequently stopped at another address as well. These stops would be anywhere from 15 to 90 minutes.

When questioned the claimant admitted he had gone to his home for lunch because he felt it was his break and he could take it anywhere he chose. When asked about the other address at which he frequently stopped he initially said it was a new account he was working on. When the employer showed him evidence that this was an address he had given to the employer earlier in his employment he confessed it was his parents' house. He maintained he stopped there to do paperwork and make calls to accounts. He did not provide adequate explanation as to why

these calls could not have been made from a parking lot at another account or a convenience store or park.

Nathan Kessler has received unemployment benefits since filing a claim with an effective date of November 6, 2011.

REASONING AND CONCLUSIONS OF LAW:

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.

The claimant acknowledged he received the policy which states the company vehicle may not be taken to an employee's home even for a lunch break, but that he never read it. He acknowledged he went to his home for lunch every day and frequently to his parents' house. He acknowledged lying to the employer about who was at the second address before being confronted with records that it was his parents' house.

An employee is responsible for reading and following policies and rules which have been provided to him which govern his job duties. The claimant not only failed to do this but then lied to the employer when questioned about some of his lengthy stops at his parents' house. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of December 12, 2011, reference 01, is reversed. Nathan Kessler is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css