

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JOHN A FULLER**  
Claimant

**MENARD INC**  
Employer

**APPEAL 21A-UI-22036-DH-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/22/21**  
**Claimant: Respondent (2)**

Iowa Code § 96.5(1) - Voluntary Quit  
Iowa Code § 96.5(2)a - Discharge for Misconduct  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

Employer, Menard Inc, filed an appeal from the September 23, 2021, (reference 01) unemployment insurance decision that granted benefits based upon finding the August 25, 2021 dismissal was not for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on December 2, 2021. The claimant, John Fuller, participated. The employer/appellant participated through Darrell Werden. Employer's three pages of exhibits were admitted. Judicial notice was taken of the administrative file.

**ISSUES:**

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?  
Was the claimant overpaid benefits?  
Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds claimant was a full time employee, with their first day of work being July 6, 2016 and their last day worked being August 25, 2021. Their title was first assistant department manager in the building materials department. On August 25, 2021, Mr. Werden (general manager of the Muscatine location), Kaitlyn Tulliani (from human resources), and claimant were physically together when claimant was terminated for violation of the company's rules regarding maintaining a workplace free and clear of harassment as set forth in the employee handbook. See Employer's Exhibit page 2.

The employer has an employee handbook. Claimant was provided a copy of the handbook on July 6, 2016. The handbook covers policies, including harassing conduct. Employer received a complaint about claimant's conduct, investigated and disciplined claimant on December 18, 2020 regarding his harassing behavior toward a minority (Hispanic) co-worker. Claimant made

comments regarding the co-workers ethnicity and immigration status. Claimant received a written warning. See Employer's Exhibit, page 3.

Employer received a complaint on August 19, 2021 about claimant's behavior on August 9, 2021 toward a female co-worker. Employer investigated the complaint, finding claimant harassed the female regarding claimant's perception of the co-workers weight where he made comments and made noises of cattle mooing. Claimant knew his job was in jeopardy from the prior disciplinary action for the same type of violation (harassment).

The administrative record reflects that claimant has received \$3,857.00 in regular unemployment benefits and \$0.00 in Federal Pandemic Unemployment Compensation (FPUC), since filing a claim with an effective date of August 22, 2021, for the week ending August 28, 2021 and the six weeks ending between September 11, 2021 and October 16, 2021. The administrative record also established that the employer did participate in the fact finding interview, a firsthand witness was available for rebuttal (Kaitlyn Tulliani, HR Coordinator) and was talked to, or provide written documentation that, without rebuttal, would have resulted in disqualification.

### **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.

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 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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, 394-395 (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 his own common sense and experience, the administrative law judge finds the employer version of events to be more credible than the claimant's recollection of those events. Claimant provided a blanket denial that anything ever happened at any time. Going so far as to assert the female assaulted him in the encounter where he supposedly did nothing.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant was aware of the rules, violated the rules, was warned and then continued to violate the rule by harassing a different employee after having been warned. Despite the warning, claimant continued to engage in similar behavior. This is disqualifying misconduct.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, 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)(a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

Regarding overpayment of benefits and whether claimant is to repay benefits and whether the employer's account is to be charged, the law is as follows.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged

for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871-subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, the \$3,857.00 in benefits that were paid for the week ending August 28, 2021 and the six weeks ending between September 11, 2021 and October 16, 2021 are benefits to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, provided the benefits were not received due to any fraud or willful misrepresentation by the claimant, overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if the employer did not participate in the initial proceeding to award benefits.


The employer did participate in the fact-finding interview or submit documentation. Since the employer did participate, claimant is obligated to repay to the agency the benefits he received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ."

Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did participate. Since the employer did participate in the fact finding interview, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The September 23, 2021, (reference 01) unemployment insurance decision is **REVERSED**. 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,857.00 and is obligated to repay the agency those benefits since the employer did participate in the fact finding interview and the employer's account shall not be charged.



Darrin T. Hamilton  
Administrative Law Judge

January 6, 2022  
Decision Dated and Mailed

dh/mh