

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

ROGER D NIELSEN
415 MEGAN CT NW
CEDAR RAPIDS IA 52405-4966

MENARD INC
4777 MENARD DR
EAU CLAIRE WI 54703

Appeal Number: 06A-UI-04110-JTT
OC: 03/26/06 R: 03
Claimant: Appellant (2)

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:

Claimant Roger Nielsen filed a timely appeal from the April 12, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 2, 2006. Claimant participated. Attorney Jennifer Giebel represented the employer and presented testimony through General Manager Gus Gerken. Exhibits One through Six were received into evidence. The hearing on this matter was consolidated with the hearing in appeal number 06A-UI-04111. Both matters involved the same parties and same issues.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Roger Nielsen was employed by Menard as a full-time manager trainee from May 31, 2005 until March 24, 2006, when General Manager Gus Gerken discharged him.

The final incident that prompted the discharge came to the attention of Mr. Gerken on March 24. On that date, Hardware Department Manager Scott Groe reported to Mr. Gerken that Mr. Nielsen had threatened hardware department employee Ken Topping after Mr. Topping refused to loan money to Mr. Nielsen. Mr. Topping receives Social Security benefits and must limit the number of hours he works each week to avoid negatively impacting his benefits. Mr. Nielsen was familiar with the Social Security guidelines based on his experience of managing a temporary employment agency. On March 24, one or more hardware department employees reported to Mr. Groe that on March 21, Mr. Topping refused to loan Mr. Nielsen money and Mr. Nielsen then threatened to contact the Social Security Administration and tell that agency that Mr. Topping was working more hours than allowed. Mr. Topping provided a written statement to the employer. Employee Cindy Hanson overheard Mr. Nielsen's remark to Mr. Topping and also provided a written statement to the employer. Mr. Nielsen was overextended financially and made a habit of petitioning coworkers for small loans, which Mr. Nielsen was then slow to repay.

Mr. Gerken discharged Mr. Nielsen for violating the employer's written policies against "threats, intimidation [or] harassment ... of Team Members," "interfering with an orderly work flow," and "engaging in solicitation ... while performing work duties or while other Team Members are in work areas." Mr. Nielsen was familiar with these policies. Mr. Gerken did not believe there was a need, prior to discharging Mr. Nielsen for the alleged misconduct, to question Mr. Nielsen regarding his behavior or intent. At the time Mr. Gerken told Mr. Nielsen that he would be discharged for threatening Mr. Topping, Mr. Nielsen specifically asked Mr. Gerken to further investigate the matter and asserted that he had merely been joking with Mr. Topping. Mr. Gerken had not received previous complaints about Mr. Nielsen petitioning coworkers for loans.

Mr. Groe, Mr. Topping, and Ms. Hanson continue to be employed by Menard, but did not testify at the hearing.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Nielsen was discharged for misconduct in connection with the employment. It does not.

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Though the employer bears to the burden of proving misconduct that would disqualify Mr. Nielsen for unemployment insurance benefits, the employer has failed to provide available direct and satisfactory evidence to corroborate and substantiate the allegation of misconduct. See 871 IAC 24.32(4). The employer had the ability to present firsthand testimony and elected not to do that. Based on the evidence in the record, the administrative law judge is able to conclude that Mr. Nielsen's petitions for money were socially inappropriate. However, the administrative law judge is not able to conclude from the evidence presented at the hearing that Mr. Nielsen in fact threatened Mr. Topping. Mr. Nielsen asserted that he made a remark in jest and the employer has failed to rebut that assertion.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Nielsen was discharged for no disqualifying reason. Accordingly, Mr. Nielsen is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Nielsen.

DECISION:

The Agency representative's decision dated April 12, 2006, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/pjs