IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LARRY L AUEN
Claimant

PELLA CORPORATION
Employer

APPEAL NO. 09A-UI-16262-LT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/25/09
Claimant: Appellant (4)

Iowa Code § 96.5(3)a – Work Refusal
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 16, 2009 (reference 02) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 3, 2009. Claimant participated. Employer participated through human resources representative Jennifer Grandgenett.

ISSUES:

The issue is whether claimant refused a suitable offer of work and, if so, whether the refusal was for a good-cause reason; if claimant was able to and available for work; and claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a production worker and took a voluntary layoff January 13, 2009 to care for his wife, who was terminally ill with cancer and died on February 3. Some weeks later, he went to the plant and met with plant manager Jeff Houton and production manager Shawn. He told them he intended to take about three weeks to travel to Washington State and asked if he was likely to be recalled during that period of time. They said he would not. He was at home on April 21 but received no messages from Grandgenett or his son-in-law Mark that he must return to work or contact the employer by the close of business on April 23 or he would be terminated from employment. Mark told Grandgenett when she asked him to pass along the recall to work message that claimant was visiting relatives in the western United States. Grandgenett did not send a written notification about the recall to claimant and did not speak to Houton or Shawn about his status. On April 22 claimant traveled to a relative's home in Iowa, stayed the night there, and was given a ride to the airport early the next morning. He spent time in Seattle and went to see a doctor for hand, arm, and hip problems but left when he was told his insurance had been cancelled and did not call the employer to investigate. After a snow-related delay driving back through Oregon, claimant arrived in Iowa sometime during the week of May 10. He did not receive Grandgenett's

message given to his son-in-law until then and contacted Grandgenett about the insurance. She told him his insurance had been cancelled because he had failed to return to work or contact the employer by the close of business on April 23. He explained he had not received the message until recently and would have to see a doctor about his medical issues before he could return to work. Grandgenett told him that he must decide that day regardless of the time it might take him to see a doctor.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not refuse recall to work, was not available for work for the three weeks ending May 9, 2009, and was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-3-a provides:

> An individual shall be disqualified for benefits:
>
> 3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
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> a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:
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> (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
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> (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
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> (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
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> (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

> However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(4) provides:

> (4) Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code § 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant's availability would be the issue to be determined in these types of cases.

Iowa Code § 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Since claimant was traveling, with employer's knowledge, and did not know about the recall until he returned, no recall was communicated and no refusal occurred. However, since claimant was not in the area or in communication with employer, even after he found out his medical insurance was cancelled, he was not available for work, and therefore is not considered eligible for benefits for the three-week period ending May 9, 2009.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Grandgenett's testimony is not credible in that she testified that claimant had called her to say he had decided to retire and later said she got the information from his son-in-law. Claimant did not refuse to return to work, because he was not aware of the recall and had been assured there would not be a recall until after he returned from travelling. When claimant became aware of the recall, he asked for reinstatement of his medical insurance and time to see a doctor and that request was refused. Again, this is not a refusal but amounted to a constructive discharge from employment when claimant was faced with an untenable situation of choosing between seeking medical care and no delay in returning to work. Since employer discharged claimant at the point where he sought a medical evaluation before returning to work, no misconduct has been established and benefits are allowed.

DECISION:

The October 16, 2009 (reference 02) decision is reversed. Claimant did not refuse recall to work, was discharged from employment for no disqualifying reason on May 11, 2009, and was unavailable for work the three-week period from April 19 through May 9, 2009. Benefits are otherwise allowed, provided claimant is eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw