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

ISSOLINE J BERRY
211 W 3RD
ROCK PORT MO 64482

PELLA CORPORATION
C/O SHEAKLEY UNISERVICE INC
NOW TALX UC EXPRESS
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 05A-UI-06833-RT
OC: 06/05/05 R: 01
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:

The claimant, Issoline J. Berry, filed a timely appeal from an unemployment insurance decision dated June 24, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on July 19, 2005, with the claimant participating. John Smith, Human Resources Representative; Scott Stohlman, Department Manager; and Terry Minor, Laborer, participated in the hearing for the employer, Pella Corporation. Steve Hatton, Department Manager, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time flex utility operator from November 29, 2004, until she was suspended on May 27, 2005, and then discharged on May 31, 2005, by letter of that date, as shown at Employer's Exhibit Two. The claimant was discharged for dishonesty and for falsely accusing co-workers of certain behavior. On or about the night of May 27, 2005, the claimant told a co-worker, Terry Minor, Laborer, and one of the employer's witnesses, that Scott Stohlman, Department Manager, and another of the employer's witnesses, "choked" her. She further indicated that she was going to get a lawyer. However, Mr. Stohlman had never touched the claimant around the neck or anywhere else, except maybe to tap her on the shoulder to get her attention. He might have raised his hands as if he were pretending to begin to choke the claimant as a joke, but never contacted her neck.

Mr. Minor told Mr. Stohlman what the claimant had said. Mr. Stohlman notified John Smith, Human Resources Representative, and another of the employer's witnesses. Mr. Smith immediately investigated and spoke to a number of co-workers. No witnesses saw Mr. Stohlman ever touch the claimant. The claimant was then suspended on May 27, 2005, and after the completion of the investigation was discharged on May 31, 2005. On April 19, 2005, the claimant received an oral counseling for spreading rumors about a co-worker being a pedophile but it was not true. On April 15, 2005, the claimant also received an oral warning for a failure to follow instructions. Finally, on April 20, 2005, or in the late evening hours of April 19, 2005, the claimant received a written corrective action letter for insubordination, as shown at Employer's Exhibit One.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 parties agree, and the administrative law judge concludes, that the claimant was suspended on May 27, 2005, and then discharged on May 31, 2005, by letter of that date as shown at Employer's Exhibit Two. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed the employer, the claimant is considered as discharged and the issue of misconduct must be resolved. Accordingly, the administrative law judge concludes that the claimant was effectively discharged on May 27, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The employer's witnesses credibly testified that the claimant accused a supervisor, Scott Stohlman, Department Manager, of choking her when she told a co-worker, Terry Minor, Laborer, and one of the employer's witnesses, that Mr. Stohlman had "choked" her. The claimant equivocated on exactly what she told Mr. Minor, but eventually conceded that she had told him that Mr. Stohlman "choked" her. The claimant testified that Mr. Stohlman had twice choked her and then later said that only once had he choked her and once just pretended to choke her. Finally, the claimant conceded that Mr. Stohlman had not choked her but had put his hands on her neck. Then the claimant said that Mr. Stohlman had put pressure on her neck when he grabbed her neck. The claimant's testimony is too inconsistent to be credible and is refuted by too many of the employer's witnesses. The claimant testified that immediately before she talked to Mr. Minor, that Mr. Stohlman had grabbed her by the arm and turned her around while she was talking to Mr. Minor. Mr. Minor denied such an occurrence. Further, Mr. Stohlman denied ever touching the claimant around the neck or anywhere else except maybe to tap her on the shoulder to get her attention. There was some evidence that perhaps Mr. Stohlman had raised his hands as if pretending to be about to choke the claimant, but in a joking manner. This was not, however, what the claimant described to Mr. Minor. The claimant further told Mr. Minor that she was going to get lawyer. Mr. Minor told Mr. Stohlman, who then told John Smith, Human Resources Representative, and another of the employer's witnesses.

Mr. Smith conducted an investigation but found no witness that stated that he or she had seen Mr. Stohlman touch the claimant. The claimant never reported this touching to the employer. The claimant testified that the she did not do so because she figured that she would not be believed. This is not credible. Throughout the hearing the claimant was combative, argumentative, and evasive. One who demonstrates these characteristics would no doubt file a

claim against anyone who had touched her inappropriately. The claimant had received oral warnings about similar behavior, including an oral warning on April 19, 2005, for spreading a rumor about a co-worker being a pedophile. The claimant initially denied the oral warning but then conceded that she had been asked about spreading the rumor. The claimant denied accusing the co-worker of being a pedophile, but, again, her denials are not credible because of the claimant's combative and argumentative nature, her evasive answers to questions, as well as her inconsistent testimony. The claimant also received a written warning on April 15, 2005, for a failure to follow instructions, although she testified initially she did not recall this oral warning, later she testified that she was told to do something two different ways by two different superiors. Finally, the claimant received a written warning, called a corrective action letter, as shown at Employer's Exhibit One. The claimant had to concede that she had received this warning, because she signed it. The administrative law judge notes that all three of these warnings were slightly more than one month before the claimant made the statements to Mr. Minor. The claimant should have been on notice that she should not make any false statements about co-workers and that if she had a problem with a co-worker, especially a supervisor, she should follow appropriate remedies provided by the employer. On the record here, the administrative law judge is constrained to conclude that the claimant's statements about her supervisor coming after the warnings were deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The statement made by the claimant is not just a mere criticism of a superior, but is a serious allegation made to a co-worker coupled with some threat that she was going to get a lawyer. Further, this comes after several warnings as noted above. The administrative law judge concludes that what occurred here was far more than ordinary negligence in an isolated instance or a good faith error in judgment or discretion, but was disqualifying misconduct. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

DECISION:

The representative's decision of June 24, 2005, reference 01, is affirmed. The claimant, Issoline J. Berry, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct.

kjw/kjw