

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ROBERT S MCCULLOUGH
Claimant

APPEAL NO. 19A-UI-01632-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION
Employer

OC: 01/27/19
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 14, 2019, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 10, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on March 11, 2019. Claimant Robert McCullough participated. Amber Kelley represented the employer and presented additional testimony through Pam Fitzsimmons and Brock Householder. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 3, 5, 7, 9, 10, 11, 15, 16, 19, 20 and 21 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert McCullough was employed by Pella Corporation as a full-time Construction Crew Technician from 1998 until January 24, 2019, when the employer discharged him from the employment in response to a significant safety incident that occurred on January 8, 2019. On January 8, Mr. McCullough was working with another employee in a lift bucket to move a 30-amp buss plug from one location to another location a short distance away. Mr. McCullough was supposed to be training other employee in matters including safety. During the process of moving the 30-

amp buss plug, the connecting prongs got bent. When Mr. McCullough was at the new location where he needed to re-insert the 30-amp buss plug, he did not discern that the connecting prongs were bent. When Mr. McCullough encountered resistance in inserting the 30-amp buss plug, he exerted additional force. The bent prongs connected two electrical circuits and sparked an arc flash or electrical explosion. The explosion plunged the immediate vicinity into darkness. Mr. McCullough was not wearing appropriate protective gear and was fortunate to escape the incident with some black marks on his face. Mr. McCullough was a seasoned employee, had received appropriate training, including training regarding project-specific protective gear. The employer suspended Mr. McCullough following the incident and notified him two weeks later that he was discharged from the employment. There were no prior safety incidents. However, in 2016, the employer had disciplined Mr. McCullough for theft of copper. In connection with that prior incident, the employer had included a provision that another work rule violation within five years would trigger termination of the employment.

Mr. McCullough established an original claim for benefits that was effective January 27, 2019. Mr. McCullough received \$3,395.00 in benefits for the seven weeks between January 27, 2019 and March 16, 2019. Pella Corporation is the sole base period employer.

On February 12, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. McCullough's separation from the employment. The employer did not have a person present for the fact-finding interview, but provided substantial documentation setting forth the particulars of the incident that triggered the suspension and discharge.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

The weight of the evidence in the record establishes misconduct in connection with the employment. The weight of the evidence establishes that Mr. McCullough knowingly decided not to wear the project-specific protective gear at the time he worked on moving the 30-amp buss plug. Mr. McCullough placed himself at risk of serious injury or death. Mr. McCullough's failure to wear the protective gear placed the employer at risk of substantial liability in connection with Mr. McCullough's decision to ignore safety protocol. To make matters worse, Mr. McCullough was supposed to be training a new employee and instead modeled a dangerous disregard for safety. Mr. McCullough's conduct demonstrated an intentional and substantial disregard for the employer's interests and constituted misconduct in connection with the employment. Accordingly, Mr. McCullough is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. McCullough must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. McCullough received \$3,395.00 in benefits for the seven weeks between January 27, 2019 and March 16, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. McCullough received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(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.

The employer satisfied the participation requirement through the documentation submitted for the fact-finding interview. Because the employer participated in the fact-finding interview within the meaning of the law, Mr. McCullough is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The February 14, 2019, reference 01, decision is reversed. The claimant was discharged on January 24, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$3,395.00 in benefits for the seven weeks between January 27, 2019 and March 16, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs