IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SCOTT OLSON
Claimant

PELLA CORPORATION
Employer

APPEAL NO: 06A-UI-10725-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09-17-06 R: 12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 27, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 20, 2006. The claimant participated in the hearing with former shipping and logistics employee Mike Schakel. Tiffany Weaver, Human Resources Representative; Jason Bingham, Department Manager; Aaron Bohn; Department Manager; Bret Walker, Department Manager; and Richard Carter, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assembler B for Pella Corporation from October 4, 2004 to September 26, 2006. On September 15, 2006, the claimant reported that co-worker Kris Walters was not wearing his proper protective equipment. Later that evening Mr. Walters told the employer the claimant was showing him pornographic pictures on his cell phone and also tried to show employee Linda Brenden the pictures. Mr. Walters indicated he saw the pictures and they were sexual in nature. When interviewed, Ms. Brenden stated the claimant wanted to show her some "up close and personal pictures" but she declined to look at them (Employer's Exhibit One). The claimant denied that the pictures were pornographic and stated he took a picture from a movie of a woman with a "pole coming out of her mouth" (Employer's Exhibit One). The claimant also told the employer he felt Mr. Walters was upset that he had reported his failure to wear safety equipment and was retaliating against him. During the investigation Mr. Walters also told the employer that on August 24, 2006, the claimant was showing inappropriate pictures of his girlfriend on his phone and another employee reported that the claimant showed her a picture of a penis (Employer's Exhibit Five). Another employee confirmed Mr. Walters' account of the August 24, 2006, incident (Employer's Exhibit Four) but the claimant testified that his cell phone was not in service in August and was not working until

September. The claimant received a written warning October 14, 2005, for failure to work required overtime and on April 10, 2006, for violating the employer's respectful work environment rules by yelling and using profanity toward another employee (Employer's Exhibits Two and Three). The employer suspended the claimant September 15, 2006, and notified him that his employment was terminated September 26, 2006.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability.

Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the administrative law judge believes the claimant was showing sexually explicit pictures to other employees August 24, 2006, none of the employees who were shown the pictures participated in the hearing and the witnesses the employer did have had not seen the pictures nor were any copies provided. Consequently, more weight must be given to the claimant's first hand testimony denying the acts he's accused of. Additionally, Mr. walters' credibility is somewhat questionable given he may have been retaliating against the claimant for reporting his failure to wear protective equipment September 15, 2006, and neither Mr. Walters or any other employee reported the August 24, 2006, incident until after the claimant reported him. If in fact the claimant showed inappropriate pictures to co-workers he used poor judgment on more than one occasion and although his termination is understandable, the administrative law judge cannot conclude that the employer has met its burden of proving disqualifying job misconduct based on the evidence presented. Therefore, benefits must be allowed.

DECISION:

The October 27, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs