BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CHERYL J CRAIN	:	
	:	**HEARING NUMBER:** 13B-UI-04217
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
PELLA CORPORATION	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Cheryl J. Crain, worked for Pella Corporation from May 19, 1997 through March 13, 2013 as a full-time general specialist. (31:46-31:26; 9:27-9:00) The claimant received a copy of the employer's handbook containing the Employer's disciplinary policy, appeal policy, *inter alia*, for which she signed in acknowledgement of receipt the last update on March 30, 2010. (13:47-13:38; 13:21, 12:12-11:48, Exhibits 7, 8 & 10)

On August 9th, Ms. Crain received a Class II corrective action letter for bypassing a safety device (lock out/tag out) to recover paper caught inside the press while it was still in progress. (22:46-21:49, Exhibit 6) The Claimant also received a Class III corrective action less on January 24, 2013 for being careless or

negligent. (21:18-20:59, Exhibit 5) Class I violations are the most punitive; while Class II and III are less disciplinary in effect. (21:41-21:33, Exhibits 7 & 8)

The Claimant felt she was being monitored and "…policed all the time [which made her] nervous and uneasy…" most of the time (8:18-8:09; 7:46-7:40; 5:50-5:23) to the point she questioned her superior (Monica) about her concerns, but nothing was done. (7:24-7:10; 4:31-4:15) She was the subject of 'tag times', which are required in the employer's policy on each member, but the Claimant never saw these 'timings' conducted on anyone else. (4:05-3:37) 'Tag time' is the amount of time it takes an employee to build a window. (2:40-2:25)

On March 12, 2013, the Claimant was working on the line. As she slid a unit across the table, she yelled out a warning when she immediately noticed that the production coordinator (Wendy Brownfield) was bending down in the vicinity. (8:08-8:00) Ms. Brownfield did not hear the warning, and the unit (window) accidently hit the production coordinator's head, which caused a contusion. The production coordinator sought first aid, but didn't require serious medical attention. (29:05-28:10; 15:56-15:37) This incident was considered a Class II violation, even though it was not a reportable OSHA action. (15:55-15:53) An investigation ensued whereupon the Employer interviewed the Claimant. At this point, Ms. Whitehead (Human Resources Representative) recommended that the Employer terminate the claimant for having three correction actions in a 12-month period, and a few other informal counselings. (29:52-29:18; 16:30-16:04, 8:50-8:27)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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 NW2d 661 (Iowa 2000).

Although the record establishes that the claimant received several disciplines, none of those violations amounted to serious infractions. In fact, the claimant had only two Class II violations for which the policy does ***not*** mandate that two Class II violations within a 12-month period will result in termination. (16:57-16:34, Exhibit 7) The final act that led to Ms. Crain's termination involved the 'accidental' pushing of a window against a co-worker's (Ms. Brownfield's) head. The claimant testified that she yelled out a warning, which the employer refutes. (8:08-8:00) We note that the Employer failed to present Ms. Brownfield who was a party to this incident at the hearing to refute or deny the Claimant's version of this incident.

Both parties, as well as one of the Employer's witnesses, agree that this incident was not an intentional act, but was an accident. (28:03-27:45; 10:40-10:35; 10:26-10:15; 8:00-7:57) Although the employer refutes that she was treated any differently than any other employee, Ms. Crain provided a cogent argument as to why she felt singled out, particularly given the Employer's allegations regarding her overall carefulness on the job. The fact that the Claimant did not appeal her termination is not indicative of misconduct such that would disqualify her for unemployment benefits. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Based on this record, we conclude that the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated May 16, 2013 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided she is otherwise eligible.

_____
John A. Peno

_____
Cloyd (Robby) Robinson

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

_____
Monique F. Kuester

AMG/fnv