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

TINA M HOREL
1002 S CENTER ST
SHENANDOAH IA 51601-2429

PELLA CORP
C/O SHEAKLEY UNISERVICE INC
NOW TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 06A-UI-04288-RT
OC: 03/26/06 R: 01
Claimant: Respondent (2)

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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Pella Corporation, filed a timely appeal from an unemployment insurance decision dated April 11, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Tina M. Horel. After due notice was issued, a telephone hearing was held on May 8, 2006, with the claimant participating. John Smith, Human Resources Representative on the second shift at the employer's plant in Shenandoah, Iowa, and Jon Heard, Second Shift Department Manager at the same location, participated in the hearing for the employer. Joyce Smay, Plant Nurse, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The employer was represented by

Richard Carter of Sheakley Uniservice, Inc., now TALX Employer Services. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time specialist on the lineal parts assembly line from October 4, 2004, until she separated from her employment on March 8, 2006. The claimant was absent from March 1, 2006 through March 8, 2006 and even continuing thereafter. The claimant's daughter was ordered by a court into a hospital but the situation was not life-threatening. The claimant worked on the night shift and the only time the claimant could see her daughter was at night. However, the claimant did not visit her daughter all night long but nevertheless still did not go to work because she had "a lot of things going on." Whether the claimant properly notified the employer of these absences is uncertain. The employer has a policy in its employee handbook, a copy of which the claimant received and for which she signed an acknowledgement, providing that an employee must notify the employer of an absence within one hour either before or after the start of the employee's shift. The employer also has a policy in the handbook that provides that absences of three consecutive days without reporting to the employer is considered a quit.

Eventually the claimant spoke to Joyce Smay, the plant nurse at the employer's plant in Shenandoah, Iowa, where the claimant was employed. Ms. Smay told the claimant that she could not qualify for leave under the Family Medical Leave Act. The claimant then came to the employer's plant and spoke to Jon Heard, Second Shift Department Manager, and turned in her badge and informed him that she was quitting due to family reasons but did not identify the family reasons. Thereafter, the claimant had no more contact with the employer. On March 8, 2006, the employer sent the claimant a letter indicating that they were treating her as a voluntary quit. On March 17, 2006, the employer sent the claimant a notice of her COBRA right indicating that her separation from employment was on February 28, 2006. Throughout 2005 and 2006, the claimant had taken intermittent leave under the Family Medical Leave Act but had had no unexcused absences from the employer since March 8, 2005. The claimant had received no warnings or disciplines for her attendance. Pursuant to her claim for unemployment insurance benefits filed effective March 26, 2006, the claimant has received unemployment insurance benefits in the amount of $1,728.00 as follows: $288.00 per week for six weeks from the benefit week ending April 1, 2006 to the benefit week ending May 6, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4), (20), (23) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.
>
> (20) The claimant left for compelling personal reasons; however, the period of absence exceeded ten working days.
>
> (23) The claimant left voluntarily due to family responsibilities or serious family needs.

Iowa Code section 96.5-1-c provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
>
> c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily left her employment when she was absent for three days in a row without notifying the employer and further so informed the employer on March 8, 2006 when she turned in her badge and said she was quitting. The claimant first testified that she was discharged on February 28, 2006 when she received the COBRA notice as shown at Claimant's Exhibit A. However, the claimant testified that she did not receive this notice until March 17 or 18, 2006 and finally conceded the notice was dated March 17, 2006 as appears at Claimant's Exhibit A. The claimant conceded that she was absent for a number of days consecutively and seemed to testify that she notified the employer promptly on all of these occasions. It is uncertain exactly when and under what circumstances the claimant notified the

employer of her absences but the administrative law judge must conclude here that there is not a preponderance of the evidence that the claimant notified the employer on March 2, 3, and 4, 2006. The employer has a policy that provides that in the event an employee is absent for three consecutive days without notifying the employer that the employee is deemed to have quit. This is also contained in the rule noted above. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily when she was absent for three days without giving notice to the employer in violation of the employer's rule. More compelling, the administrative law judge concludes that the claimant quit on March 8, 2006 when she came to the employer's plant and so informed the employer's witness, Jon Heard, Second Shift Department Manager. Mr. Heard credibly testified that the claimant came to the plant that day and told him that she was quitting and turned in her badge. He further testified credibly that the claimant said she was quitting due to family reasons but did not specify the reasons. The claimant eventually conceded that on March 8, 2006 she did turn in her badge and may have told Mr. Heard that she was quitting. This occurred long before the claimant had received a COBRA notice, which she received on March 17 or 18, 2006 which was dated March 17, 2006. This was also before the claimant would have received a letter sent by the employer on March 8, 2006 notifying the claimant that she was considered to have voluntarily quit. Accordingly, the administrative law judge concludes that the claimant voluntarily left her employment effective March 8, 2006. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6(2). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The only reason apparent from the evidence for the claimant's quit was a family crisis related to her daughter who was hospitalized under court order. However, the daughter's condition did not appear life-threatening. The claimant testified that she could only see her daughter at night and that she worked on the night shift. However, the claimant conceded that she did not spend all night long every night with her daughter. The claimant testified that she did not go to work because she had "lots of things going on." The administrative law judge is not without sympathy for the claimant but must conclude here that the claimant did not have good cause for all of her absences from work and being absent for three days in a row without giving notice to the employer in violation of the employer's rule is not good cause attributable to the employer. Further, leaving work for compelling personal reasons when the period of absence exceeds ten working days is also not good cause attributable to the employer. Finally, leaving work voluntarily due to family responsibilities or serious family needs is not good cause attributable to the employer. The administrative law judge does not believe that Iowa Code section 96.5(1)(c) applies here because under that statute the claimant must leave her employment for the necessary and sole purpose of taking care of a member of the immediate family who has been injured or ill and after the member of the family is sufficiently recovered the claimant immediately returned to the employer and offered to go back to work and no work was available. Here, although the claimant's daughter is clearly a member of the claimant's immediate family, there is not a preponderance of the evidence that the claimant left for the necessary and sole purpose of taking care of her daughter. The daughter was hospitalized and was being taken care of by healthcare providers or other kinds of providers. Further, there is no evidence that the daughter has recovered and the claimant has returned to the employer. Again, the administrative law judge reiterates that he is not without sympathy for the claimant but must conclude on the record here that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive

unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The soonest the claimant testified she was discharged was on or about March 17 or 18, 2006. By then the claimant had missed many days of work. Even assuming that the claimant was discharged on March 8, 2006, the claimant had missed seven days of work. The administrative law judge does not believe that the condition of the claimant's daughter required that the claimant miss seven full days of work and more work thereafter. This may seem unduly harsh and the administrative law judge does not mean it to be. The administrative law judge is not without sympathy for the claimant but an employee's responsibility is to come to work whenever possible and here the claimant did not do so and, as a consequence, her absences are not for reasonable cause or personal illness and not properly reported and would be excessive unexcused absenteeism. Accordingly, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism, and she would still be disqualified to receive unemployment insurance benefits.

The evidence offered at the hearing indicated another potential issue; namely, whether the claimant was ineligible to receive unemployment insurance benefits because, at relevant times, she is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3). Since that issue was not set out on the notice of appeal, the administrative law judge does not now have jurisdiction to decide that issue. Since the administrative law judge has concluded above that the claimant is disqualified to receive unemployment insurance benefits, the administrative law judge concludes that it is not now necessary to remand this matter to Claims for an investigation and determination as to whether the claimant is and was, at relevant times, able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3). However, should the claimant's separation be deemed not to be disqualifying, this matter should be remanded to Claims for such an investigation and determination.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,728.00 since separating from the employer herein on or about March 8, 2006 and filing for such benefits effective March 26, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid

such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of April 11, 2006, reference 01, is reversed. The claimant, Tina M. Horel, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. The claimant has been overpaid unemployment insurance benefits in the amount of $1,728.00.

cs/kjw