

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

TRAVISM YOUNGBLOOD

Claimant,

and

PELLA CORPORATION

Employer.

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HEARING NUMBER: 09B-UI-09217

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

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

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The employer 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 **AFFIRMS**, in part as to both the **timeliness** and **able and available issues**, and **REVERSES**, in part as to the **merits** as set forth below.

FINDINGS OF FACT:

The claimant, Travis M. Youngblood, worked for Pella Corporation from April 16, 2004 through August 6, 2008, 2008 as full-time utility operator. (Tr. 2, 5, 8, 11) The claimant was off work on FMLA sometime in 2007. Beginning June 23rd, 2008 through July 8th, 2008, Mr. Youngblood called off work due to illness, except for July 2nd, which he worked. (Tr. 8) On July 8th, he requested FMLA to which the employer informed him that he wasn't on any current approved medical leave. (Tr. 8, 11,

) The employer issued a letter dated July 16th that directed him to return to work on June 24th.

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Mr. Youngblood returned to work on July 21st and requested the following day off to spend time with his brother who came in town, which was granted. (Tr. 8) The claimant worked July 23rd and the 24th. He began calling off work for various reasons that prompted the employer sending a second 'return to work' letter dated August 1st, 2008. (Tr. 8) This letter included FMLA paperwork. (Tr. 8-9, 11)

Mr. Youngblood called off work from August 1st through August 6th, leaving a voicemail on Mr. Schroeder's answering machine indicating his absences were due to a power outage and having to take care of personal issues, i.e., blind son. (Tr. 9, 15, 17) He had not yet returned the completed FMLA paperwork, and the employer considered these last absences to be personal business, i.e., unexcused. (Tr. 10-11) The employer terminated Mr. Youngblood on August 6, 2008 for chronic absenteeism. (Tr. 11)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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).

871 IAC 24.32(7) provides:

Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

At first blush, the claimant's chronic attendance concerns seem to relate primarily with illness, which he properly reported. According to the precepts of Cosper, *supra*, absences due to illness, which are properly reported, are excused and not misconduct. In the instant case, however, Mr. Youngblood's continuous calling off work for various personal reasons rendered several of his absences unexcusable by both the employer's attendance policy as well as case law. See, Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) The employer has a right to expect its employees to comply with its attendance policies.

In the past, Mr. Youngblood demonstrated his knowledge and ability to comply with the employer's policy with regard to FMLA when he took medical leave earlier in the year. Yet, the second time around, the claimant failed to comply with the employer's numerous requests that he complete FMLA paperwork, again, for his current run of absences that began in late June. Instead, Mr. Anderson continued to report off work, initially, for illness, and then finally his last absences were for personal reasons, i.e., power outage and the need to care for his blind son. While we sympathize with the claimant's plight, given his tenuous position with regard to attendance, it was incumbent upon him to follow through with the employer's directive. Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

Mr. Youngblood's absences from August 1st through the 6th were considered unexcused since he failed to submit the necessary FMLA paperwork to cover this time away. It is difficult to understand why the claimant did not make alternate arrangements given the extended nature of power outage. Based on this record, we conclude that the employer satisfied their burden of proving that the claimant had excessive unexcused absences.

DECISION:

The administrative law judge's decision dated November 19, 2008 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Elizabeth L. Seiser

Monique F. Kuester

AMG/ss

DISSENTING OPINION OF JOHN A. PENO:

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.

John A. Peno

AMG/ss