

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRIS K KIRKPATRICK
Claimant

APPEAL NO. 07A-UI-01025-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION
Employer

**OC: 12-31-06 R: 03
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 19, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 21, 2007. The claimant did participate. The employer did participate through Julie Wolf, Human Resources Representative and Jason Schwartz, Production Manager for Patio Door Plant and Nick Heims, Department Manager for Patio Door Plant. Employer's Exhibit One was received.

ISSUES:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a wood fabricator full time beginning November 1, 2004 through January 3, 2007 when he was discharged.

The claimant was discharged for using the employer computer and Internet inappropriately during work time. On December 13 the claimant was seen by Mr. Heims accessing a non-work-related web site. The only work-related web site the claimant should have been accessing was the oracle site to order more wood. Mr. Heims is familiar with the oracle website and testified credibly that the claimant was not on the oracle website. When he was observed at the computer the claimant was on work time, not break time. Even if the claimant were visiting a Pella Company website to investigate health insurance benefits for his girlfriend, he was doing so on work time, when he should have been researching that issue, before or after work or on a break time.

The claimant had been given a copy of the employer's handbook or policy book that deals with use of the Internet. Employees are only allowed to use the Internet for personal use during break or lunch periods, or before or after their work shift.

When the claimant noticed Mr. Heims in his work area, he quickly exited out of the website he was visiting. If the claimant actually believed he was allowed to be visiting the web site during the time period he was viewing it, there would have been no reason for him to exit the website when he saw his supervisor. The claimant was suspended on December 13 pending an investigation. When the investigation was completed on January 3 he was discharged. The employer's investigation took longer than normal because of the plant shut down for the holiday break.

On November 9, 2006 the claimant was disciplined for using the Internet and the computer for personal reason on work time. The claimant was given a written write-up that put him on notice that any further infractions within the next twelve months could lead to his discharge.

While the claimant alleges that other employees engage in the same behavior, without recrimination, (the claimant mentioned Dan DeHon), it is clear from the employer's testimony that Mr. DeHon, among others have been disciplined for using the Internet for personal use on company time. Just because the claimant is not made privy to all employees' disciplinary history, does not mean that employees are not disciplined for violation of the computer policy.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

The claimant was given fair warning that the employer was no longer going to tolerate his performance and conduct, that is his using the employer's computer and Internet on company time for personal business. The claimant had been given a written warning just the month before for the exact same conduct and behavior that is inappropriate use of the employer's computer. The claimant knew that there were standards and rules of conduct he needed to comply with in order to preserve his employment. Even if the claimant were visiting a Pella website when he was seen by Mr. Heims, he was accessing it during work hours when he should not have been. In light of the claimant's previous disciplinary history for the same violation, disqualifying misconduct has been established. Benefits are denied.

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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The January 19, 2007, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has

worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,672.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs