

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA L FORD
Claimant

APPEAL NO. 07A-UI-00033-JTT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

PELLA CORPORATION
Employer

**OC: 11/26/06 R: 03
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Pella Corporation filed a timely appeal from the December 19, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 18, 2007. Claimant Joshua Ford participated. Richard Carter of TALX UC eXpress represented the employer and presented testimony through Human Resources Representative Jill Rozendaal and Department Manager Laura Mracek. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant and received Employer's Exhibits One through Four into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joshua Ford was employed by the Pella Corporation as a full-time assembler from September 9, 2002 until November 21, 2006, when Department Manager Laura Mracek and the Production Manager discharged him for attendance and for misrepresenting the reason for an absence. Mr. Ford's shift began at 5:30 a.m.

The final incident that prompted the discharge occurred on November 13. On that date, Mr. Ford left a voice mail message for Ms. Mracek at 4:40 a.m. In the message, Mr. Ford said he had been at the hospital with his ill grandmother and was too tired to come to work. Shortly thereafter, Ms. Mracek reviewed the message and telephoned Mr. Ford. Ms. Mracek denied the request for time off and reminded Mr. Ford that he had prior attendance violations. Mr. Ford indicated that he would report to work. When Mr. Ford had not reported for work by 9:30 a.m., Ms. Mracek telephoned him again. At that time, Mr. Ford indicated that he had fallen asleep and indicated that he would report to work. Mr. Ford reported to work at 10:40 a.m. Shortly thereafter, Ms. Mracek and Human Resources Representative Jill Rozendaal summoned Mr. Ford to a meeting. During this conference, Mr. Ford indicated that neither he nor his grandmother had been at the hospital. Mr. Ford indicated that he had needed to care for his sister overnight and until she left for school, while his mother tended to his grandmother's

medical needs. Ms. Mracek and Ms. Rozendaal requested that Mr. Ford provide documentation regarding his grandmother's medical circumstances and his role in addressing them. Mr. Ford agreed to provide documentation. Ms. Mracek and Ms. Rozendaal then suspended Mr. Ford pending a review of his employment and a decision regarding whether he would be allowed to continue in the employment. The employer requested that Mr. Ford provide documentation by the next day.

On November 14, Mr. Ford provided a note from his mother and a note from his grandmother's home healthcare nurse. The mother's letter indicated that the grandmother had suffered a stroke several years earlier and was paralyzed on one side. The letter indicated that Mr. Ford's uncle had summoned the mother because the uncle thought the grandmother needed to be transported to the hospital. The letter indicated that the mother needed Mr. Ford to care for his sister until she left for school because no one else was available to care for the girl. Mr. Ford's sister is eight-years-old. The letter from the nurse indicated that the nurse had provided care for the grandmother at the grandmother's home on November 13. The letter from the nurse did not reference a crisis that would have prevented Mr. Ford from appearing for work as scheduled.

The employer has a written attendance policy set forth in an employee handbook. Mr. Ford received a copy of the handbook. The policy required Mr. Ford to notify his supervisor no later than the start of his shift if he needed to be absent. The employer had another handbook policy that notified Mr. Ford that the employer deemed providing false information in connection with a time-off request to be a violation that would prompt disciplinary action.

On October 30 and 31, and November 1, Mr. Ford called in absences due to a breakup with a girlfriend. On August 28, Mr. Ford was absent due to personal business. Between July 31 and August 11, Mr. Ford was absent from nine shifts for personal reasons. On May 8-9, Mr. Ford was absent for personal business. On April 25, Mr. Ford was absent due to a flat tire. Though the flat tire occurred when Mr. Ford was closer to work than home, Mr. Ford obtained a ride home instead of work and then waited until later to address the flat tire. The employer had issued written warnings to Mr. Ford for attendance on September 27 and November 2.

Mr. Ford established a claim for benefits that was effective November 26, 2006, and has received benefits totaling \$2,338.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Ford was discharged for misconduct in connection with the employment. It does.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Mr. Ford's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The greater weight of the evidence establishes that Mr. Ford provided the employer with bogus information regarding his need to be tardy or absent from his shift on November 13. The

evidence fails to indicate circumstances relating to Mr. Ford's grandmother's health that would have necessitated Mr. Ford being up all night or tardy for work. The evidence indicates that even after Mr. Ford's sister was off to school, Mr. Ford failed to report for work because he had fallen asleep. The administrative law judge concludes the final absence was unexcused. The final unexcused absence followed the many unexcused absences outlined above. The unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ford was discharged for misconduct. Accordingly, Mr. Ford is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Mr. Ford.

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.

Given that Mr. Ford has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Ford must repay to the Agency. Mr. Ford is overpaid \$2,338.00.

DECISION:

The Agency representative's December 19, 2006, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$2,338.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw/css