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

LELAND F DAVIS
806 CLINTON ST
OTTUMWA IA 52501

PELLA CORPORATION
C/O SHEAKLEY UINSERVICE INC
NOW TALX EMPLOYERS SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 04A-UI-08404-RT
OC: 07-04-04 R: 03
Claimant: Respondent (1)

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 96.5-2-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 July 26, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Leland F. Davis. After due notice was issued, a telephone hearing was held on August 25, 2004, with the claimant participating. Amy Carpenter, Human Resources Representative, and Roger Van Wyk, Department Manager, participated in the hearing for the employer. The employer was represented by Richard Carter, of Sheakley Uniservice, Inc., now TALX Employers Services. The administrative law judge takes official notice of Iowa Workforce Development 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, the administrative law judge finds: The claimant was employed by the employer as a full-time Flex Logistics Operator 1 from September 8, 2003 until he was discharged on June 1, 2004. The claimant was discharged for three corrective action letters in a year related to attendance and safety. In regards to the corrective action for safety, the claimant received a corrective action letter on December 2, 2003 for having two minor collisions with the forklift which he was operating. On that day, December 2, 2003, the claimant hit a recycling container with the back of his forklift, but caused no damage to either the forklift or the recycling container, and did not damage the product that the claimant was carrying. Also on that day, the claimant hit another forklift with the back of his forklift, but caused no damage to either forklift. These acts resulted in a corrective action letter dated December 2, 2003. The employer's policy does require that such an incident be reported to the employer, but the claimant did not report these incidents.

Concerning the claimant's attendance, in March 2004, the claimant had a seizure at home. He had had no prior history of this. This seizure required numerous doctor's appointments and also absences because of his seizure condition. The claimant explained this to the employer and was told at first that if he presented doctor's excuses he would not be terminated but later was told otherwise. The claimant had doctor's excuses for most, if not all, of the absences. The claimant was absent for personal illness or doctor's appointments and these absences were properly as follows: May 27, 2004 (The claimant made arrangements in advance for a doctor's appointment, but the doctor changed the appointment so the claimant could not come to work when expected, but he properly reported his absence.); May 17, 2004; May 7, 2004; May 6, 2004; May 4, 2004; May 3, 2004; April 28, 2004; April 20, 2004; April 8, 2004; April 5, 2004; April 2, 2004; and March 29, 2004. The claimant was also absent for personal business on March 31, 2004; March 23, 2004; and March 24, 2004. These three absences were properly reported. The claimant could not remember exactly what the personal business was, but did indicate that on a couple of occasions he had to be absent because his child was sick and believed that these were the absences for that. The claimant was also tardy 15 minutes on February 3, 2004, when the claimant did show up for work but was delayed by a supervisor and was called tardy. The claimant was absent on December 24, 2003 for personal illness and although he properly informed someone at the employer and was told that his absence was acceptable, the absence was listed as a no-call/no-show or a failure to report. This was during a time when the claimant was supposed to be working the shut down of the plant but could not make it because he was ill. The claimant received two corrective actions for his attendance, one on May 6, 2004 and one on June 1, 2004, which triggered his discharge. The employer has a policy that three corrective actions in a year establish a discharge, and the claimant was then discharged on June 1, 2004. The claimant had also received other warnings about his attendance, including a written warning on May 19, 2004; a corrective counseling written warning on April 4, 2004; a written warning on March 30, 2004; and an oral warning on February 3, 2004. Pursuant to his claim for unemployment insurance benefits filed effective July 4, 2004, the claimant has received unemployment insurance benefits in the amount of $1,776.00 as follows: $222.00 per week for eight weeks from benefit week ending July 10, 2004 to benefit week ending August 28, 2004.

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 not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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, (7) provide:

> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (7) 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.

The parties testified and the administrative law judge concludes that the claimant was discharged on June 1, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying

misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including excessive unexcused absenteeism. The employer's witnesses testified that the claimant was discharged because he received three corrective action letters in a year, which required discharge under the employer's policies. The first of the correction action letters was dated December 2, 2003, involving safety matters, when the claimant twice struck items with his forklift on December 2, 2003. The claimant was not discharged for this, but given a corrective action letter. Thereafter, the only corrective action letters received by the claimant and the only violations alleged against the claimant were for attendance. Discharging the claimant on June 1, 2004 for the safety corrective action letter is really a discharge for past conduct. A discharge for misconduct cannot be based on such past act or acts. 871 IAC 24.32(8). The administrative law judge concludes that the claimant was really discharged for alleged excessive unexcused absenteeism.

The claimant had numerous absences in the last three months of his employment, but almost all of the absences, as set out in the Findings of Fact, were for personal illness or doctor's appointments and all were properly reported. Even the employer's witnesses concede this. At first glance, the number of absences for illness or doctor's appointments might seem excessive. However, the claimant credibly testified that in March 2004 he had a seizure at home, without any prior history of such seizures. This alarmed him and the medical professionals and required that the claimant attend a number of doctor's appointments and also be absent from work for illness. The employer was aware of the claimant's condition and at first told the claimant that if he provided doctor's excuses he would not be terminated. The claimant provided doctor's excuses for most, if not all of his absences related to his health. Nevertheless, the claimant was discharged for his attendance. In addition to the absences for his health, the claimant was also absent on three occasions for personal business, each of which was again properly reported. The claimant could not recall all of these absences, but credibly testified that they were for a sick child or again for doctor's appointments or personal illness. The claimant was also absent on December 24, 2003, when he was sick and, although the employer had it as a no-call/no-show without a proper reporting, the claimant credibly testified that he had reported to someone at the employer that he was going to be ill, and this was acceptable. Finally, the claimant was tardy on February 3, 2004 because he was prevented from starting to work promptly by a supervisor and then was called tardy. On the evidence here, the administrative law judge is constrained to conclude that all of the claimant's absences and tardies were for personal illness or reasonable cause and properly reported and were not excessive unexcused absenteeism. Even assuming that the claimant's tardy on February 3, 2004 and his absence on December 24, 2003 were not for reasonable cause and not properly reported, those were only two unexcused violations. Generally it requires three unexcused absences or tardies to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W. 2d 517 (Iowa App. 1982). Here, the claimant, at most, had two. Therefore, the administrative law judge concludes that claimant's absences and tardies were not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to

warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,776.00 since separating from the employer herein on or about June 1, 2004 and filing for such benefits effective July 4, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated July 26, 2004, reference 01, is affirmed. The claimant, Leland F. Davis, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

b/kjf