

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN A LEMKE

Claimant

APPEAL NO. 09A-UI-15869-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION

Employer

Original Claim: 03/22/09

Claimant: Appellant (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a department decision dated October 6, 2009, reference 01, that held he was discharged for misconduct on September 4, 2009, and that denied benefits. A telephone hearing was held on November 23, 2009. The claimant and his attorney, David Dixon, participated. Jay Garner, HR Representative, participated for the employer. Claimant Exhibit A and Employer Exhibits 1 through 22 were received as evidence.

ISSUES:

Whether the appeal is timely.

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant received the department decision mailed on October 6, 2009 the following day. The claimant went to his Oskaloosa workforce center on October 7, submitted his appeal, and requested it be faxed to Unemployment Appeals. The workforce center attempted to fax it on October 7, but the transmission did not go through. When the claimant did not receive notification that his appeal had been received, he contacted his local workforce center, and it re-submitted by fax his appeal on October 19, which was received.

The claimant began employment on August 20, 2001, and last worked for the employer as a full-time operator on September 2, 2009. The claimant received an employee handbook that contained the policies of the employer. The claimant received safety training on the line of fire policy. The employer's corrective action policy provides two infractions within 24 months will usually result in discharge. Mistakes due to carelessness or horseplay that affect your safety and/or the safety of others are dischargeable offenses.

The claimant received a written warning (Class 2 Corrective Action) on April 16, 2009 for failing to brake his parked forklift, which caused it to move and damage employer property. Although the forklift was retired due to length of service, there had been no problems with the parking brake prior to this incident. The claimant had previously been counseled about a forklift incident on March 12. Due to these incidents, the claimant was denied his license to drive any forklift. The claimant was warned that a further infraction within a 24-month period would result in termination or discharge.

The claimant was moving a large window unit on September 1. Rather than seeking assistance, he attempted to maneuver it on his own, and the unit began falling. The claimant placed himself in the line of fire, and the unit fell on him. The employer concluded the claimant violated the employer's safety policy and instruction on how to handle the unit, and it discharged him for a second infraction within 24 months.

REASONING AND CONCLUSIONS OF LAW:

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 administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on September 2, 2009, for a repeated violation of company safety policy by incurring two infractions within 24 months.

The claimant knew the employer's safety (in line of fire) policy, and he receiving training regarding the infraction violations. Failing to engage the parking brake is wanton carelessness; and noticing that it is moving is more than ordinary carelessness, as it requires a knowing failure to do what is required in the operation of the machine. Failure to request assistance and then placing oneself in harm's way of a falling object is wanton carelessness, as it is a conscious decision to do something contrary to policy and instruction. The claimant knew his job was in jeopardy on April 16 and he violated the employer's policy to have assistance in moving the window unit, which led to him choosing to place himself in position for personal harm.

DECISION:

The department decision dated October 6, 2009, reference 01, is affirmed. The claimant was discharged for misconduct on September 2, 2009. Benefits are denied until the claimant re-qualifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw