

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

KRISTINA M SIMMONS
PO BOX 181
OSKALOOSA IA 52577

PELLA CORPORATION
c/o SHEAKLEY UNISERVICE INC
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 04A-UI-04605-RT
OC: 03-21-04 R: 03
Claimant: Respondent (2)

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 96.5-1 – Voluntary Quitting
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 April 12, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Kristina M. Simmons. After due notice was issued, a telephone hearing was held on June 7, 2004 with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. In fact, two different notices for hearings were sent to the claimant and the claimant responded to neither nor was either notice returned to the Appeals Section. Lance Traster, Human Resources

Representative, and Felicia VanDusseldorp, participated in the hearing for the employer. The employer was represented by Von A. Boyenger of Sheakley Uniservice, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. A hearing was initially scheduled for May 17, 2004 at 11:00 a.m. and rescheduled at the employer's request.

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 assembler B from June 16, 2003 until she separated from her employment on March 17, 2004. The claimant was absent for three consecutive workdays, March 11, March 15, and March 16, 2004, without notifying the employer. The claimant was not scheduled to work on March 12, March 13, and March 14, 2004. In fact, the employer did not hear from the claimant since March 10, 2004. The employer has a policy that provides that three consecutive absences without notifying the employer is considered a voluntary quit. This policy is in the employer's handbook, a copy of which the claimant received and for which she signed an acknowledgement. The policy also provides that an employee must call and notify the employer of an absence within one hour of the employee's shift. The claimant's shift began at 4:30 p.m.

The claimant was absent on March 8, 2004 and reported this absence to the employer but not in a timely fashion. The claimant said that she was ill and would be going to an ultra sound on March 12, 2004 which was not a day the claimant was scheduled to work. The claimant was absent on March 9, 2004 and again reported to the employer but not in a timely fashion. This time the claimant stated that she had a large cyst and would bring in a doctor's excuse. The claimant was absent on March 10, 2004 and this was timely reported, indicating that she would be providing a doctor's excuse for the three absences but not indicating anything about further absences.. These three messages about the claimant's absences were all voice mail messages left for the claimant's manager, Felicia VanDusseldorp, one of the employer's witnesses. The claimant was never told that she was discharged or fired by either Ms. VanDusseldorp or the employer's other witness, Lance Traster, Human Resources Representative, nor was the claimant ever told that she was discharged or fired by anyone that either of the employer's two witnesses heard about. They also had not heard that the claimant had ever notified anyone else in human resources about any of these absences. If the claimant had returned to work on March 11, 2004, with the reason for her absence, work would have been remaining for her to do.

The claimant had other absences along with warnings. On January 27, 2004, the claimant received a corrective action letter for absences on January 15 and January 19 which she failed to report. The claimant was also absent on January 14 but she did report this to the employer and was absent on January 20 when the claimant's husband reported this to the employer but there was no report for January 15 and January 19, 2004. The claimant also received a corrective action letter on February 10, 2004 for an absence on February 2, 2004. On that occasion, the claimant was stranded on the way to work and was not able to come to work and called in late. In this corrective action letter, the claimant was informed that continued violations of the attendance policy could result in further corrective actions including termination. The claimant also received a formal written counseling on October 21, 2003 for her attendance and two informal counselings for her attendance on August 25, 2003 and December 10, 2003.

Pursuant to her claim for unemployment insurance benefits filed effective March 21, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,270.00 as follows: \$227.00 per week for 10 weeks from benefit week ending March 27, 2004 to benefit week ending May 29, 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.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer.

871 IAC 24.25(4) provides:

- (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

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) 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.

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 first issue to be resolved is the character of the separation. The employer maintains that the claimant left her employment voluntarily when, in violation of the employer's policy, she was absent for three consecutive days, March 11, March 15, and March 16, 2004, without notifying the employer. In fact, the evidence establishes that after March 10, 2004, the claimant never communicated with the employer. The claimant was absent on March 10, 2004 and did call in a timely fashion and leave a voice mail message for her supervisor but at that time the claimant did not mention further absences nor did she on any other occasion when she left a voice mail message or reported an absence. The claimant did not participate in the hearing but seems to maintain that she was discharged. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The employer's witnesses credibly testified that the claimant was absent for three consecutive days without notifying the employer and this is considered a voluntary quit and also is considered without good cause attributable to the employer. In fact, the employer's witnesses credibly testified that the claimant has never contacted the employer thereafter. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective March 17, 2004 after being absent without notifying the employer for three consecutive days. The issue then becomes whether the claimant left her employment with the employer herein without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer.

See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide reasons attributable to the employer for her quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The evidence establishes that the claimant had three absences on March 11, March 15, and March 16, 2004 without notifying the employer. These absences were not for reasonable cause or personal illness and not properly reported. Further, the claimant had three absences on March 8, March 9, and March 10, 2004, only two of which were properly reported, two being reported untimely. The employer has a rule that requires that an employee who is going to be absent or tardy call the employer within one hour of the employee's shift. The claimant did not do so on March 8 and March 9, 2004. Further, the evidence establishes that the claimant was absent on January 15 and January 19, 2004 without reporting those absences and was absent on February 2, 2004 when she was stranded on the way to work and called that absence in late. For these absences the claimant got two written corrective action letters, one on January 27, 2004 and one on February 2, 2004. The claimant also received a written formal counseling for attendance on October 21, 2003 and two informal counselings on her attendance on August 25, 2003 and December 10, 2003. It is clear from the evidence that the claimant had numerous absences and had received numerous warnings and should have been well aware that her attendance was a primary concern to the employer but nevertheless failed to report properly nine absences. Accordingly, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and would still be disqualified to receive unemployment insurance benefits.

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 \$2,270.00 since separating from her employer on or about March 17, 2004 and filing for such benefits effective March 21, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 12, 2004, reference 01, is reversed. The claimant, Kristina M. Simmons, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. The claimant is overpaid unemployment insurance benefits in the amount of \$2,270.00.

tjc/b