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

NANCY C KELDERMAN
507 MERNA DR
KNOXVILLE IA 50138-1167

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

Appeal Number: 06A-UI-04939-RT
OC: 04/02/06 R: 02
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 96.5-2-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 May 2, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Nancy C. Kelderman. After due notice was issued, a telephone hearing was held on May 24, 2006, with the claimant participating. Pam Fitzsimmons, Human Resources Representative; Kenneth Howe, Operator; and Wayne Anschutz, Senior Quality Engineer; participated in the hearing for the employer. Randy Hall was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. The employer was represented by Richard Carter of Sheakley Uniservice, Inc., now TALX

Corporation. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

On May 18, 2006, the claimant faxed a request for a subpoena of numerous documents. The administrative law judge called the claimant at 1:02 p.m. on May 19, 2006. The administrative law judge informed the claimant that he was going to deny her request for a subpoena at that time. The administrative law judge explained that there was insufficient time, in view of the intervening weekend, to issue the subpoena to the employer and have it timely received by the employer and allow the employer sufficient time to act on the subpoena. The administrative law judge also explained that the claimant did not demonstrate, for many of the requested items, any real relevance. The administrative law judge also informed the claimant that much of the information contained in those documents could be provided by testimony. Finally, the administrative law judge informed the claimant that he could keep the record open following the hearing on May 24, 2006, issue the subpoenas for any required documents, and reconvene the hearing to consider the admission of those documents. At the completion of the evidence, the administrative law judge concluded that none of the documents requested by the claimant were necessary for a proper resolution of this matter and, in fact, would be either irrelevant or unnecessary or repetitive and the claimant agreed. Accordingly, no subpoena will be issued and the record was closed and the hearing completed at 4:37 p.m. on May 24, 2006.

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, most recently as a quality technician since January 19, 2004, from January 31, 2000 until she was discharged on April 3 2006. The claimant was suspended without pay on March 29, 2006. The employee was suspended and then discharged for falsifying employer records. As a quality technician, the claimant was responsible for performing a random audit on each assembly line every night and completing a No. 1 number metric audit form for the audit. On March 27, 2006, the claimant was supposed to audit the main assembly line. To audit the line the claimant is to examine a completed and packaged unit produced by the assembly line for defects. The claimant did not perform an actual audit on the unit but merely performed a quality inspection but completed a No 1 number metric audit form as if an actual audit had been done. The employer learned of this when the unit which the claimant stated in the form had been audited and showed no defects, actually had numerous defects including poly on window glass, three stains on the wood frame, two nicks or dents in the wood, and scratches on the metal cladding. All of these defects would have been easily visible to the claimant and should have been noted on the No. 1 number metric audit form. The claimant had audited the main line on numerous occasions before. The claimant was confronted with this matter on March 29, 2006, including the unit in question, and the claimant then noted all of the defects. The claimant had no explanation. Falsifying employer's records is a class one offense requiring immediate discharge according to policies in the employer's handbook. This handbook was reviewed with the claimant several times.

On December 1, 2004, the claimant was given an informal counseling with a written record for performing an audit and passing an item with a label missing. At the time the claimant conceded that she had not given the item a thorough examination. The claimant was given only an informal counseling because the claimant had only been performing such audits as a quality technician for 11 months and the employer wanted to give the claimant a break. On December 6, 2005, the claimant was given an informal counseling with a written record because her audit report was incorrect. A unit passed by the claimant had poly on the glass

and the claimant missed this. The claimant was given only an informal counseling at this time because human resources had not become involved and the employer believed that the issue was not significant. However, the employer believed that the issues arising out of the incident on March 27, 2006 were very significant and the claimant was suspended on March 29, 2006 and then discharged on April 3, 2006. Pursuant to her claim for unemployment insurance benefits filed effective April 2, 2006, the claimant has received unemployment insurance benefits in the amount of $2,268.00 as follows: Zero benefits for the benefit week ending April 8, 2006 (vacation pay $652.00) and $324.00 per week for seven weeks from April 15, 2006 to May 27, 2006.

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 96.5-2-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.

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).

871 IAC 24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 3, 2006 after being suspended without pay on March 29, 2006. Whenever a claim is filed and the reason for the unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as a discharged. Accordingly, the administrative law judge concludes that the claimant was effectively discharged on March 29, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. 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 was discharged for disqualifying misconduct.

The employer's witnesses credibly testified that on March 27, 2006, the claimant did not perform a random quality audit on the main line as she was supposed to do but nevertheless completed a No. 1 number metric audit form as if an audit had been done. The employer's witnesses credibly testified that the unit identified in the No. 1 number metric audit form as having no defects actually had numerous defects as set out in the Findings of Fact. All the defects were easily visible and should have been noted by the claimant. When the claimant was confronted about this on March 29, 2006, the claimant was able to note all of the defects immediately. The claimant had audited the main line on numerous occasions.

The claimant's testimony to the contrary was not credible. The claimant testified that she actually performed an audit but that she pulled the unit out of the press before it was packaged and found no defects. However, two employer's witnesses testified that such an audit cannot be done until the item or unit is packaged at least according to the employer's rules. Even assuming that the claimant had done an audit, she did it improperly. Also, one of the employer's witnesses, Kenneth Howe, was working on the line throughout the claimant's shift and testified credibly that although the claimant may have done a quality inspection she did not do a full No. 1 number metric audit. This was confirmed by hearsay evidence of another witness, Patrick Lemke. Mr. Howe also testified that he and Mr. Lemke would have had to have repackaged the unit had the claimant removed the packaging but they did not have to repackage any unit. A full audit includes an audit of the packaging. It is in the first category of the No. 1 number metric audit form. The claimant then testified that later she audited the unit's packaging. Even later the claimant testified that the problem was her fault and that this was not like her and that she was confused and at one point indicated that it was a terrible mistake. The claimant received two informal counselings for problems with prior audits she had performed, one on December 1, 2004 and another on December 6, 2005. Although the claimant denies actually committing the offenses generating the warnings, at the very least, the claimant was on notice that the employer was concerned about her auditing performance.

Based upon the record here and for all the reasons set out above, the administrative law judge concludes that the claimant did not do a proper audit of the subject unit on March 27, 2006 but completed the No. 1 number metric audit form as if she had. Although it is a close question, the administrative law judge concludes that claimant's failure was a deliberate act constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct for those reasons. More compellingly, the administrative law judge concludes that, at the very least, the claimant's audit on March 22, 2006 was carelessness or negligence and that in view of the claimant's prior warnings, the carelessness or negligence was in such a degree of recurrence as to also establish disqualifying misconduct. The claimant testified that she was undergoing "stresses" but the administrative law judge does not believe that those excused the claimant's performance here. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct 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.

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 $2,268.00 since separating from the employer herein on or about March 29, 2006 and filing for such benefits effective April 2, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of May 2, 2006, reference 01, is reversed. The claimant, Nancy C. Kelderman, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of $2,268.00.

cs/pjs