

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TIMOTHY JOHNSON**  
Claimant

**APPEAL 21A-UI-08865-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PELLA CORPORATION**  
Employer

**OC: 01/10/21  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment  
PL 116-136, Sec. 2014 – Federal Pandemic Unemployment Compensation

**STATEMENT OF THE CASE:**

The employer filed an appeal from the March 16, 2021, (reference 02) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but willful misconduct could not be shown. The parties were properly notified of the hearing. A telephone hearing was held on June 14, 2021. The claimant did not participate. The employer participated through Human Resources Representative Amber Kelley. Human Resources Representative Reagan Melton observed, but did not participate. The administrative law judge took official notice of the agency records. Exhibits 1 and 2 were admitted into the administrative record.

**ISSUE:**

- Was the claimant discharged for disqualifying job-related misconduct?
- Whether the claimant was overpaid regular unemployment insurance benefits? Whether the claimant is excused from repaying those benefits due to the employer's non-participation at fact-finding?
- Whether the claimant has been overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed as a full-time painter from November 9, 2020, until he was separated from employment on December 17, 2020, when he was terminated. The claimant's immediate supervisor was Department Manager Cole Silver. As they perform their work, painters are to wear personal protective equipment from head to toe with gloves and safety glasses. The work is performed in front of them.

The employer provided a copy of its corrective action guidance. (Exhibit 2) The corrective action guidance lists “willful/serious violation of safety rule that could lead to serious injury” as a class one violation. The corrective action states that a class one violation “will usually result in immediate discharge.” The claimant was given this policy upon hire. The claimant also was trained using proper personal protective equipment shortly after being hired.

On December 17, 2020, the claimant sprayed paint the employer uses for exterior painting of windows and doors into his hair at 11:50 a.m. About an hour later, the claimant dipped his glove covered hands into red paint which was also used for painting the exterior facing areas of windows and doors in his hair.

Later in the day on December 17, 2020, the claimant was taken to the Health Services Department. The Health Services Department was reviewing the material safety data sheets to check for adverse effects on his hair and skin. The claimant was instructed to use dish soap. The claimant was fortunate he did not use chemicals the employer uses to remove paint because it would have resulted in chemical burns. After getting out of the company shower, Ms. Kelley interviewed the claimant regarding what occurred. During the interview, the claimant acknowledged he painted his hair intentionally because a coworker dared him to do it. Ms. Kelley informed the claimant that he was suspended pending further investigation.

On December 23, 2020, Ms. Kelley informed the claimant that he was being terminated for the incident that occurred on December 17, 2021.

The claimant filed for benefits effective January 10, 2021. His weekly benefit amount was \$114.00. He received his full weekly benefit amount for the four weeks from January 16, 2021 to the week ending February 6, 2021 for a total of \$456.00. The claimant received \$1200.00 gross in Federal Pandemic Unemployment Compensation for the weeks ending February 6, 2021.

Ms. Kelly stated the employer did not receive the notice of fact-finding. The administrative records KFFV and KFFD show a fact-finding notice was mailed to the parties on March 3, 2021 for an interview scheduled on March 12, 2021. Iowa Workforce Development representative Alicia Muniz called Cheyanne Randall, but the line was busy. Ms. Kelley believes Ms. Randall is an agent of the employer’s third party hearing representative provider.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying misconduct. Since the claimant is not disqualified from benefits, the issue of overpayment is moot.

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.

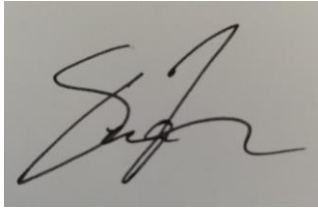
This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer states its policy characterizes this kind of violation as a class one violation, which ordinarily justifies immediate discharge. The employer's policy is not dispositive of the case. Ms. Kelly stated that this type of violation results in immediate discharge because it likely could have led to the claimant being seriously injured. The administrative law judge does not find this fact pattern to fit that rationale. This is not a fact pattern similar to a lock out / tag out violation or something else that presents the very real possibility of serious injury or death. Ms. Kelley contends the claimant could have suffered from chemical burns if he had used the chemical the employer uses to remove paint from its products. This contention is not compelling because the claimant did not use the chemical remover on his hair. The administrative law judge does not condone the claimant's behavior, but absent other similar instances of misconduct, this incident alone is insufficient to support the notion the claimant engaged in willful misconduct. Benefits are granted provided he is otherwise eligible.

**DECISION:**

The March 16, 2021, (reference 03) unemployment insurance decision is affirmed. The claimant was discharged due to a non-qualifying reason. As a result, the overpayment issue is moot. Benefits are granted provided he is otherwise eligible.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

---

Sean M. Nelson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515) 725-9067

June 30, 2021  
Decision Dated and Mailed

smn/lj