

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHERYL J CRAIN
Claimant

APPEAL NO. 13A-UI-04217-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION
Employer

OC: 03-10-13
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 29, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 14, 2013. The claimant did participate. The employer did participate through (representative) Diane Carpenter, Human Resources Representative, Monica Whitehead, Department Manager, Julie Wolf, Human Resources Manager, and Shane McHenry, Production Manager. Employer's Exhibits One through Fifteen were entered and received into the record.

ISSUES:

Was the claimant discharged due to job connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a general specialist full time beginning May 19, 1997 through March 13, 2013 when she was discharged. On August 9, 2012 the claimant was given a class two corrective action after she removed a safety guard, crawled on top of a table and put her hands into the point of operation of a machine. She had received the employer's safety rules and regulations as well as training on how to safely operate machinery. The claimant was next given a class three warning on January 24, 2013 for carelessness and negligence after she failed to drill several window pieces correctly. During the last months of her employment the claimant was given several counseling sessions by managers as they worked with her in an attempt to improve her job performance.

The last incident occurred when the claimant was working on March 12 on the production line. She was performing her normal job duties that she had completed successfully many times previously. She saw that her production coordinator, Wendy, was kneeling down below the level of the work surface, without warning Wendy, the claimant shoved a window across the work surface so hard it hit Wendy in the head leaving her with a contusion and at least one day

off work. While there is no contention that the claimant was intentionally trying to hit Wendy in the head with the window, she did not warn Wendy and could have prevented the accident by simply being more careful. The employer routinely watches all employees work and times how long processes take in order to understand how their business is operating. The claimant was not targeted for special surveillance by the employer. Being nervous is no excuse for not working in a safe manner. Because this was the claimant's third write up in a twelve-month period, she was discharged.

The claimant has received unemployment benefits after the separation on a claim with an effective date of March 10, 2013.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant was given repeated verbal and written warnings about carelessness and safety concerns. The claimant's own careless action resulted in an injury to her coworker. The claimant could have easily avoided the accident by at least making sure her worker knew she was shoving a window

across the work station toward her. After so many years on the job, there is no excuse for such careless behavior in a matter that involved employee safety. The claimant had ample opportunity to correct her behavior. She had been given warnings about carelessness and about safety both within the last year of her employment. The employer watching work process was for the employer's benefit and is no excuse for such careless conduct that resulted in an injury to a coworker. Claimant's repeated failure to safely and accurately perform her job duties after having been warned is evidence of carelessness to such a degree of recurrence as to rise to the level of disqualifying job related misconduct. Benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The March 29, 2013 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs