IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ERICH LOTZ
Claimant

HY-VEE INC
Employer

APPEAL NO: 12A-UI-10849-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/12
Claimant: Appellant (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 17A.12-3 - Non-Appearance of Party

STATEMENT OF THE CASE:

Erich Lotz (claimant) appealed an unemployment insurance decision dated August 31, 2012, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Hy-Vee, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was scheduled for September 24, 2012 for Spencer, Iowa. The claimant had requested the in-person hearing but requested a postponement of that hearing because he was going out of the country. The administrative law judge spoke with him and the claimant agreed to go telephone.

A telephone hearing was held on October 17, 2012. The claimant and his friend Marty Faulker, participated in the beginning of the hearing but not the entire hearing. The employer participated through Kelly Nieland, Human Resources Manager; Brittney Clayton, Manager of Store Operations; and Sabrina Bentler, Employer Representative. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The claimant requested a postponement of his in-person hearing and the postponement was granted with his agreement that the hearing would be scheduled for a telephone hearing. He participated in the beginning of the hearing on October 17, 2012. The claimant was called at 1:04 p.m. and the parties went on record at 1:10 p.m. There was no complaint by the claimant as to having any hearing difficulties until 18 minutes and 42 seconds after he was initially contacted, which would have been approximately 1:23 p.m. The claimant was then disconnected and the administrative law judge called him back at 1:26 p.m. and left a message. The administrative law judge called the claimant a second time and he answered.

During this call and unlike the first connection, the claimant's phone/microphone now appeared to be in a strong wind current and it was difficult to hear him. He was questioned as to whether he was in or near his home in Spencer and he said he was at home. He was questioned as to whether he was inside or outside and he said he was inside. The claimant said he could not hear and the administrative law judge questioned him as to what type of wind was affecting his cell phone to which he said none. The wind noise stopped and started again several times. The claimant said we were breaking up and the administrative law judge advised him that he already had one postponement and would not be granted another one. He was asked whether he could hear, he said he could and the administrative law judge said the hearing was going forward. Since a document was being addressed, the claimant was asked about it within minutes and he had again disconnected. The administrative law judge called him two additional times leaving messages both times. The second call was made at 1:34 p.m. and the Appeals Section number was provided but he was advised that the hearing was going forward.

The hearing was completed and the record closed at 1:39 p.m. The claimant did not call in before the record closed and/or before the end of the day. At 9:35 a.m. on October 18, 2012, the administrative law judge received an email message with an attached document that had been faxed in by the claimant on October 17, 2012 at 3:49 p.m. The claimant stated as follows: "I believe it would be in the best interest of myself and other parties to reschedule a hearing. I requested an in person hearing previously and request to have an in person hearing again. Do *(sic)* to Iowa workforce *(sic)* reception the hearing couldn't be conducted in a fairly *(sic)* manner. I have no control over the weather and the wind that was gusting up to 50 miles per hour."

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time assistant manager in the grocery department from September 5, 2011 through August 10, 2012 when he was discharged for repeatedly violating cash accountability procedures. He received his first written warning for violating this policy on May 14, 2012 and he signed that warning. The claimant failed to loan the night stock registers and failed to double count the registers.

A second and final written warning was issued on June 27, 2012 for failing to complete the cash accountability procedures. He did not double count the gas station, he did not count the satellite register and he did not double sign the paid outs. A list of his requirements and the cash accountability procedures was provided with this warning and includes the following:

> All registers are to be counted between different cashiers.
>
> All registers are to be balanced before leaving each night.
>
> Customer service, night stock (AM), and fuel station registers are to be doubled counted every night.
>
> Paid outs are to be signed twice, by the cashier and the manager on duty.
>
> All lottery related paid outs must be double counted.
>
> All drop drawers are to be locked at the end of the night. Customer service and on each register.
>
> The safe is to be balanced each night.

Double count the gas station safe.

Log lottery at the gas station.

When done in the safe it is to be locked immediately, no exceptions.

Cash deposits for customer service must be double counted by a manager.

All checks must be accounted for.

Loans must be written up at night and done in the morning.

The claimant signed this list and was made aware in writing that any further violations of these procedures would result in his termination. He was discharged on August 10, 2012 for his failure to close and lock the gas station safe on August 9, 2012.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined is whether a postponement should be granted and/or whether the record should be reopened. For the following reasons, the administrative law judge concludes it should not be postponed or reopened.

871 IAC 26.8(2) provides:

> (2) A hearing may be postponed by the presiding officer for good cause, either upon the presiding officer's own motion or upon the request of any party in interest. A party's request for postponement may be in writing or oral, provided the oral request is tape-recorded by the presiding officer, and is made not less than three days prior to the scheduled hearing. A party shall not be granted more than one postponement except in the case of an extreme emergency.

The claimant's request for a postponement was made after the record had closed and he has already been granted one postponement. His telephone reception difficulties do not amount to an emergency, let alone an extreme emergency.

The Iowa Administrative Procedures Act § 17A.12-3 provides in pertinent part:

> If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the record was considered closed. The request to reopen the record is denied because the party making the request failed to participate by not being available at the telephone number provided and/or by not providing a reliable connection when he could have simply gone to the Spencer Workforce office to complete the telephone hearing.

The substantive issue to be determined is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on August 10, 2012 for repeatedly violating cash accountability policies after being warned. His conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated August 31, 2012, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

_____
Decision Dated and Mailed

sda/pjs