

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES E WIKSTROM JR
Claimant

APPEAL NO. 07A-UI-10291-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS DAIRY INC
Employer

**OC: 10/07/07 R: 01
Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

James E. Wikstrom, Jr. (claimant) appealed a representative's October 29, 2007 decision (reference 01) that disqualified him from receiving unemployment insurance benefits, and held the account of Wells Dairy, Inc. (employer) was not subject to charge because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 26, 2007. The claimant responded to the hearing notice, but was not available for the hearing. A message was left for the claimant to contact the Appeal Section immediately. The employer's representative, Josh Burrows, participated in the hearing. The employer's witness, Alfredo Moreno was not available for the hearing.

The employer's representative's request to continue the hearing because the employer's witness was not available was denied. The claimant contacted the Appeals Section at 4:00 p.m. and requested that the hearing be reopened. Based on the claimant's request to reopen the hearing, the administrative record and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is there good cause to reopen the hearing?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on January 31, 2000. The claimant worked full-time on the night shift. The employer implemented an occurrence-based attendance policy on January 1, 2007. This policy defined unexcused absences or tardies as anything that had not been approved by the employee's supervisor before the end of the last shift worked. When an employee accumulated six unexcused absences/tardies, the employee received a counseling. The employee received a written warning upon accumulating seven unexcused absences/tardies. The employer gave the employee a final written warning when the employee

accumulated eight unexcused absences/tardies. The employer discharged employees when they accumulated nine unexcused absences/tardies.

On May 29, 2007, the claimant received a counseling because he had six unexcused absences/tardies since January 1, 2007. On May 31, 2007, the claimant received a written warning for having seven unexcused absences/tardies since January 1, 2007. On September 24, the claimant received a final written warning for attendance issues because he had eight unexcused absences/tardies. The claimant understood his job was in jeopardy.

On October 2, 2007, when the claimant went to his truck to go to work, he discovered his truck had been vandalized and he had two flat tires. Another employee did this to the claimant. The claimant called his supervisor to report he was unable to work as scheduled because of the vandalism to his truck, and his vehicle was the only way he had to get to work. The claimant reported the vandalism to his vehicle to the local law enforcement officials.

On October 3, 2007, the employer discharged the claimant because his October 2 absence from work was unexcused and this was his ninth unexcused attendance occurrence. The claimant established a claim for unemployment insurance benefits during the week of October 7, 2007. He has not filed any weekly claims.

The claimant was not available for the scheduled 11:00 a.m. hearing on November 26. The claimant called the Appeals Section at 4:00 p.m. on November 26 and requested that the hearing be reopened. The claimant was at work at 11:00 a.m. and thought he would get break around 11:00 a.m. so he could participate in the hearing. The claimant did not get a break at 11:00 a.m. and was not available for the hearing. As soon as the claimant was off work at 4:00 p.m. he called the Appeals Section to participate in the hearing. The claimant made a request to reopen the hearing.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c).

The claimant knew about the scheduled 11:00 a.m. hearing and took a chance that he would be on break to take the phone call. The claimant's gamble that he would be available for the call was not successful. As a result, he was not available for the hearing. Since the claimant did not contact the Appeals Section to see if the hearing could be rescheduled to another time, he did not establish good cause to reopen the hearing. The claimant's request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or

repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

Based on the employer's attendance-occurrence policy, the record establishes that the employer had business reasons for discharging the claimant. The most recent absence was beyond the claimant's control. As soon as the claimant discovered his vehicle had been vandalized and had two flat tires, he notified the employer that he was unable to work as scheduled the night of October 2. He also contacted his local law enforcement officials. The current act for which the claimant was discharged does not establish that he intentionally failed to work as scheduled. Instead, he promptly notified the employer about unexpected vehicle problems and established justifiable reasons for not reporting to work on October 2, 2007. The claimant did not commit a current act of work-connected misconduct. As of October 7, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The claimant's request to reopen the hearing is denied because he did not establish good cause to reopen the hearing. The representative's October 29, 2007 decision (reference 01) is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of October 7, 2007, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirement. The employer's account may be charged if the claimant files any weekly claims.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css