IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MATHEW F WALLING
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 15A-UI-03040-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/08/15
Claimant: Appellant (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(9) – Suspension
871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

Matthew Walling appealed an unemployment insurance decision dated March 5, 2015, reference 01, that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that he had been suspended on February 9, 2015 for violation of company rules. A telephone hearing was scheduled for April 7, 2015 and the parties were appropriately notified of the hearing. Neither party responded to the hearing notice instructions to provide a telephone number for the hearing nor did either party participate in the hearing. The administrative law judge took official notice of the agency's administrative record (APLT and Clear2There Hearing Control Screen) that document the parties failure to provide a telephone number for the hearing. Based on the appellant's failure to participate in the hearing, the administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Whether the claimant was suspended on or about February 9, 2015 for misconduct in connection with the employment that would disqualify him for benefits or that would relieve the employer of liability for benefits.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal by notice mailed on March 13, 2015. The appellant, Matthew Walling, failed to provide a telephone number at which he could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer also did not respond to the hearing notice or participate. There is no evidence the hearing notice mailed to either party was returned by the postal service as undeliverable for any reason.

The administrative law judge has conducted a careful review of the administrative file to determine whether the unemployment insurance decision should be reversed. The employer participated in the fact-finding interview through Phyllis Farrell, Equifax Unemployment

Insurance Consultant. There is no reason to believe that Ms. Farrell had any personal knowledge concerning the particulars of the claimant suspension. The employer did not have anyone else participate in the fact-finding interview. Both parties indicated at the fact-finding interview that the claimant had been suspended for the period of February 9 through 13, 2015 due to alleged misconduct and during an investigation into the alleged misconduct. The employer provided no particulars regarding the alleged misconduct. Both parties indicated at the fact-finding interview that the claimant was brought back to work after the suspension and that he was paid for the period of suspension.

In response to the suspension, Mr. Walling established a claim or benefits that was effective February 8, 2015. Workforce Development calculated Mr. Walling's weekly benefit amount at $337. Mr. Walling has not received any unemployment insurance benefits in connection with the claim.

REASONING AND CONCLUSIONS OF LAW:

Iowa Admin. Code r. 871-26.8(3), (4) and (5) provide:

> Withdrawals and postponements.
>
> (3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.
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> (4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.
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> (5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed evidence in the record and concludes that the unemployment insurance decision previously entered in this case is incorrect and should be reversed.

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.

Iowa Admin. Code r. 871-24.32(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.
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> This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbal v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Administrative Code rule 871-24.32(9) provides as follows:

> 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 employer had the burden of proving misconduct at the fact-finding interview and at the appeal hearing. The employer did not present any evidence of misconduct at the time of the fact-finding interview or the appeal hearing. Thus, there was no legal or evidentiary basis for the claims deputy's conclusion that the claimant was suspended for misconduct. The claimant was suspended for no disqualifying reason and is eligible for benefits for the period of suspension, provided he meets all other eligibility requirements. Those eligibility requirements would include that requirement that the claimant was able and available for work during the period of the suspension and that he weekly wages did not exceed his $337 weekly benefit amount by more than $15. In the event the claimant met all eligibility requirements for the period in question, the employer's account may be charged for benefits paid to the claimant for the period of suspension.

Even if the claimant had been suspended for misconduct, there was no legal authority for the expending the period of the disqualification beyond the period of suspension or for relief of the employer from liability for benefits beyond the period of suspension. See FDL Foods vs. EAB, 456 N.W.2d 233 (Iowa Ct. App. 1990).

Pursuant to the rule, the employer must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the employer from participating in the hearing at its scheduled time.

DECISION:

The March 5, 2015, reference 01, decision is reversed. The claimant was suspended February 9 through 13, 2015 for no disqualifying reason and is eligible for benefits for the period of suspension, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid for the period of suspension.

This decision will become final unless a written request establishing good cause to reopen the record is made to the administrative law judge within 15 days of the date of this decision.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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