

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANNE M ESPINO
Claimant

APPEAL NO. 07A-UI-10641-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HCM INC
Employer

OC: 10/14/07 R: 03
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

HCM, Inc. (employer) appealed a representative's November 7, 2007 decision (reference 01) that concluded Dianne M. Espino (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 4, 2007. The claimant responded to the hearing notice, but was not available when she was called for the hearing. A message was left for the claimant to contact the Appeals Section immediately. Maggie Austin, the director of nursing, appeared on the employer's behalf.

While the hearing was in process, the claimant called the Appeals Section. The administrative law attempted to contact the claimant two times after she called the Appeals Section. The phone number called was the same one the claimant provided before the hearing and the one she had called from shortly after 10:00 a.m. When the claimant was called the second and third times, a recorded message indicated the customer was not available. Two messages were left for the claimant to immediately contact the Appeals Section again. The claimant did not contact the Appeals Section again until 11:00 a.m. When she was called for the fourth time on December 4, the claimant was at the same phone number that had been called before. The claimant made a request to reopen the hearing because she asserted no one contacted her after she called the Appeals Section shortly after 10:00 a.m.

Based on the claimant's request to reopen the hearing, 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.

ISSUES:

Is there good cause to reopen the hearing?

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

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on June 11, 2007. The employer hired the claimant to work as a full-time CNA. The claimant was hired as a 90-day probationary employee, which meant she had to satisfactorily complete her first 90 days of employment. The claimant received a copy of the employer's attendance policy. The policy informed her that if an employee did not call or report to work, the employer considered this a Category I offense, which meant the employee was subject to immediate termination.

On July 17, the employer gave the claimant a verbal warning for failing to notify the employer two hours in advance that she was unable to work as scheduled. On August 10, the employer gave the claimant a verbal warning for failing to report to work as scheduled and for failing to contact the employer. The claimant came to work at 10:00 a.m. that day to take care of a family member. When asked why she had not reported to work as scheduled, the claimant indicated she had not known she was scheduled to work that day. The employer warned the claimant that her job was in jeopardy and if she had any more attendance issues she could be discharged.

On September 6, the claimant was scheduled to work at 5:45 a.m. The schedule had been posted in late August. When the claimant did not report to work, the employer called the claimant at 6:00 a.m. The claimant reported that she did not know she was scheduled to work. Even though the employer asked the claimant to come to work, the claimant declined to report to work. The claimant indicated she had to stay home to make sure her children got to school.

Since the claimant was a probationary employee, and this was the second time she asserted she had not known she was scheduled and refused to report to work on September 6, the employer discharged the claimant for continued attendance problems.

The claimant established a claim for unemployment insurance benefits during the week of October 14, 2007. The claimant filed claims for the weeks ending October 20 through November 17, 2007. She received her maximum weekly benefit amount of \$147.00 for each of these weeks.

The claimant was not available for the scheduled 10:00 a.m. hearing. The claimant responded to the message about contacting the Appeals Section immediately. The claimant called the Appeals Section while the employer was on the phone. After learning the claimant had contacted the Appeals Section again, two attempts were made to call her to connect her to the hearing. Both times the message on the claimant's phone indicated the customer was not available. Both times when the claimant was subsequently called, a message was left on the claimant's phone telling her she had to immediately contact the Appeals Section again because she was not available when the administrative law judge called her.

The claimant called the Appeals Section a second time at 11:00 a.m. The claimant asserted she had been waiting for the call and did not receive a call. The claimant waited an hour because she thought the administrative law judge was busy with another case(s). 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 administrative law judge questions the claimant's credibility. It does not make sense for the administrative law judge to talk to someone the first time the phone number was called. (This was when the claimant was not present or available for the hearing.) Five to ten minutes later when the same phone number was called, the call went through, because a message was left for the claimant both times. The fourth time the administrative law judge called the claimant, again at the same phone number; the administrative law judge talked to the claimant. The claimant's story is not credible based on the fact messages were left on the phone for the claimant. (The calls and messages were recorded.) In this case, the claimant was not available for the scheduled hearing until 11:00 a.m., even though the hearing was scheduled for 10:00 a.m. The claimant did not establish good cause to reopen the hearing and her request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. 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).

The claimant was a probationary employee and knew she had to satisfactorily complete her first 90 days of work before the employer hired her permanently. The first time the claimant indicated she had not known she was scheduled to work, the employer warned her that this could not happen again. Less than a month later, the claimant again failed to report to work as scheduled. The schedule had been posted at least a week earlier, so the claimant had the opportunity to check the schedule and find out when she was scheduled to work. The second time the claimant failed to report to work as scheduled because she had not looked at the schedule amounts to an intentional and substantial disregard of the standard of behavior the employer had a right to expect from her. The employer discharged the claimant for reasons constituting work-connected misconduct. As of October 14, 2007, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits she is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending October 20 through November 17, 2007. The claimant has been overpaid \$735.00 in benefits she received for these weeks.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's November 7, 2007 decision (reference 01) is reversed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of October 14, 2007. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant has been overpaid and must repay a total of \$735.00 in benefits she received for the weeks ending October 20 through November 17, 2007.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw