

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JEFF W WULF**  
Claimant

**ALLIED SERVICES LLC**  
Employer

**APPEAL 15A-UI-06907-DL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/10/15**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 4, 2015, (reference 02) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on July 20, 2015. Claimant participated with Taylor Wulf and Susan Wulf. Employer did not respond to the hearing notice instruction and did not participate. The employer called after the hearing record was closed and thought he called or Equifax called on his behalf but had no control number.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?  
Should the hearing record be reopened?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The parties were properly notified of the scheduled hearing on this appeal. The instructions inform the parties that if the party does not contact the Appeals Bureau and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The respondent failed to provide a telephone number at which he or a representative 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 first time the respondent directly contacted the Appeals Bureau was on July 20, 2015, after the scheduled start time for the hearing and after the record had been closed. The respondent had not read the information on the hearing notice, and believed he called or Equifax called on the employer's behalf but had no control number.

Claimant was employed full-time as a truck driver from January 1, 2015, and was separated from employment on February 26, 2015, when he was discharged because of his work-related back injury. Claimant sold his business to Republic Waste and Dave Flackey at 6449 Valley Drive, Bettendorf, Iowa, and was retained as an employee. He was injured at work on January 27, 2015. He was medically released to work on February 3, 2015. His hours and related pay were reduced until the discharge date.

## REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the respondent's request to reopen the hearing should be granted or denied.

Iowa Admin. Code r. 871-26.14(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.

The first time the respondent called the Appeals Bureau for the hearing was after the record had been closed. Although the respondent may have intended to participate in the hearing, the respondent failed to read or follow the hearing notice instructions and did not contact the Appeals Bureau as directed prior to the hearing. The administrative rule specifically states that *failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing*. The respondent did not establish good cause to reopen the hearing. Therefore, the respondent's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. Since the claimant was discharged because of his work-related injury, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

**DECISION:**

The June 4, 2015, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs