

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARRELL D FLOWERS

Claimant

APPEAL NO: 14A-UI-04872-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC

Employer

OC: 04/13/14

Claimant: Appellant (1)

Section 96.5-2-a – Discharge
§ 17A.12-3 – Non-appearance of Party
871 IAC 25.8(5) – Decision on the Record
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Darrell D. Flowers (claimant) appealed a representative's May 8, 2014 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Packers Sanitation Services, Inc. (employer). Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 9:30 a.m. on May 30, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and register a telephone number on the Appeals Bureau's conference call system at which he could be reached for the hearing and did not participate in the hearing. The employer responded to the hearing notice and indicated that Eric Jackson would participate as the employer's representative. The administrative law judge considered the record closed at 9:45 a.m. and excused Mr. Jackson. At 10:00 a.m., the claimant called the Appeals Section and requested that the record be reopened. Based on a review of the available information and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the May 30, 2014 hearing. The instructions inform the parties that if the party does not contact the Appeals Bureau and register the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The instructions provide an alternative to calling the Appeals Bureau, which is "if you have Internet access, visit <http://ia.c2tinc.com/register/> and follow the instructions to provide your phone number for the hearing . . ." The first time the claimant directly contacted the Appeals Bureau was on May 30, 2014, 30 minutes after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice which had been mailed to

him on May 15, and had assumed that the Appeals Bureau would initiate the telephone contact even without a response to the hearing notice. He assumed that the changes he had made online to his claim contact information on May 12 would be sufficient, even though that was not through the website address specified.

The claimant started working for the employer on October 18, 2013. He worked full time as a laborer. His last day of work was November 22, 2013. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism. The claimant had missed five days of work, including no-call, no-shows on November 19, November 20, and November 21. The claimant had previously been advised of the employer's attendance policy and that his absences could be placing his job in jeopardy.

The claimant established an unemployment insurance benefit year effective April 13, 2014. His weekly benefit amount was calculated to be \$107.00. While he did have some other wages with other employers after November 22, by April 13 those wages had not reached at least \$1,070.00 so as to requalify him after his separation with this employer.

REASONING AND CONCLUSIONS OF LAW:

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 26.8(4) and (5) provide:

(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.

(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.

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 hearing record was closed. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice. Further, the claimant's delay in contacting the Appeals Bureau for 30 minutes beyond the scheduled time for the hearing was not reasonable; to reopen the record under these circumstances would be detrimental to the rights of the party who did properly respond.

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). The claimant's final absence was not excused and was not shown to be due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct. The claimant has not yet requalified after the separation from this employer.

DECISION:

The representative's May 8, 2014 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of November 22, 2013. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css