IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 05A-UI-05404-H2T
OC: 04-10-05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 10, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on June 20, 2005. The claimant did not participate. The claimant did not answer the phone when he was called to participate in the hearing. The employer did participate through Cara Mayner, Human Resources Manager and Jean Creighton, Vocational Coordinator. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a prevocational assistant full time beginning July 27, 2004 through

February 18, 2005 when he was discharged. The claimant called in sick on February 14, 2005. He was a no-call/no-show on February 16, 2005. On February 17, the claimant called in sick around 10:00 a.m. The employee handbook which had been given to the claimant requires that employees who are sick or too ill to work call in a least six hours prior to the start of their shift, or as soon as possible. It is not always possible for an employee to know six hours ahead of their shift start time that they will be sick and unable to work. The claimant called in late, but because he was sick. The claimant returned to work on February 18 and was allowed to work the entire day. The claimant has numerous other absences, but other than February 14, 2005, when he was a no call-no show, his other absences were due to illness. The claimant was last warned about his attendance on January 7, but he was not discharged, even though he had absences on January 17, 18, 25 and February 14. The employer did not follow through after giving the claimant a final warning. The claimant's discharge from employment was due to a final incident of absenteeism on February 17, when he called in to report his absence related to illness.

The claimant called the day after the hearing record had been closed and had not followed the hearing notice instructions pursuant to 871 IAC 26.14(7)a-c. He was not available at the number he provided he could be reached at for the hearing.

The claimant received the hearing notice prior to the June 20, 2005 hearing. The instructions inform the parties that if the party does not contact the Appeals Section 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 claimant was not present to answer the phone when he was called for the hearing. The claimant directly contacted the Appeals Section one day after the hearing record had been closed. The claimant indicated he had not been called and that he was at the number he provided. The claimant was given instructions when he called in that if he did not receive a call by five after the hour, he was to contact the Appeals Section. The administrative law judge recorded her attempt to reach the claimant. The claimant was not available and did not call the Appeals Section until over a day after the hearing had been conducted. Had the claimant really been waiting for the phone call as indicated, then why did he not contact the appeal section when no call came as he expected?

REASONING AND CONCLUSIONS OF LAW:

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

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.

The claimant called the Appeals Section for the June 20, 2005 hearing over a day after the hearing record had been closed. Although the claimant may have intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and was not available to participate in the hearing when called by the administrative law judge. 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. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

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

Iowa Code section 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.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

The claimant was entitled to fair warning that the employer was no longer going to tolerate his performance and conduct. Without fair warning, the claimant had no way of knowing that there were changes he needed to make in order to preserve his employment. The employer gave the claimant a final warning, but then let him continue working and let him continue with unexcused absences. The employer's conduct can reasonably be interpreted as acquiesce to the claimant's conduct. Because the final absence for which he was discharged was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The May 10, 2005, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjw