

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TOM B ABEL
Claimant

APPEAL NO. 09A-UI-09459-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 05/31/09
Claimant: Appellant (1)

Section 96.5-2-a -- Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 26, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 17, 2009. Employer participated by Cheryl Knutson, Employee Relations Coordinator, and Kristy Hearn, Housekeeping Manager. Although the claimant responded to the hearing notice and provided a telephone number at which he could be reached, he did not answer the telephone. The administrative law judge called the number twice and let the phone ring in excess of five rings each time. No voice mail picked up and the claimant did not call in during the hearing.

After the hearing was concluded and the record was closed, the claimant called in. He asked that the record be reopened. The administrative law judge explained to the claimant that the telephone number he had provided had been dialed on two separate instances and in each case the phone rang more than five times without answer. The claimant asked what number had been called and it was confirmed that the number that the claimant provided was the correct number. The claimant said that someone must have been on the phone but the number did not register as busy.

ISSUES:

Whether the claimant was discharged for misconduct.

Whether the record should be reopened.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was hired on November 7, 2005, as a housekeeper. He was assigned to the operating room and the anesthesia room. These areas had to be clean and sterile at all times. This was the claimant's responsibility.

On February 22, 2009, the claimant's manager, Kristy Hearn, met with him because of her concerns over his performance. She had personally witnessed him sitting in the operating room and not doing his work. She counseled him that he could not take unauthorized breaks and could not take breaks at all in the operating room as that was a clinical setting. After this verbal counseling, which was part of the employer's progressive discipline program, Ms. Hearn received complaints from the manager of the anesthesia area that this area was not being cleaned. Ms. Hearn personally investigated and found that the complaints were valid. The claimant was issued a written reprimand on April 13, 2009.

On May 4, 2009, the claimant was given a three-day suspension without pay after it was discovered that he was taking unauthorized breaks in the nurses' lounge and in the physicians' lounge and was not properly doing his work. Because he was not working, the areas he was responsible for in the hospital were not being cleaned. Even after this suspension, Ms. Hearn discovered that the claimant was still taking unauthorized breaks and using the nurses' lounge and the physicians' lounge. A meeting was held with the claimant on June 2, 2009. The employer discussed again its concerns and the claimant informed the employer that he would continue to take breaks when he wanted and would use the lounges. He was then terminated effective June 2, 2009.

REASONING AND CONCLUSIONS OF LAW:

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(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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In this case, the claimant worked as a housekeeper and was responsible for cleaning the operating room and the anesthesia room. The employer had an interest in making certain that these areas were clean and sterile so that patients of the hospital would be given safe and effective care. The employer also had a reasonable expectation that the claimant would perform his job duties and take his breaks where and when he was to do so.

The claimant repeatedly and deliberately violated the employer's policies concerning breaks. He took unauthorized breaks in unauthorized places including the operating room, the nurses' lounge, and the physicians' lounge. Even after he was counseled and given a written reprimand and a three-day suspension, he continued to take unauthorized breaks and fail to perform his responsibilities. He told the employer that he was going to do it because other employees did it. The employer has established misconduct that disqualifies the claimant from receiving unemployment insurance benefits.

The next issue is whether the record should be reopened.

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 received the notice of the hearing and provided a phone number where he could be reached. The administrative law judge called the number twice and the claimant did not answer. The hearing then proceeded. After the record was closed and the hearing concluded, the claimant called. He said that he did not hear the phone ring. The administrative law judge verified that the correct number had been dialed. The claimant's explanation was that someone else was on the line. It was explained to the claimant that the phone rang and there was no busy signal. It is the claimant's responsibility to make certain that he has a working phone and that the phone line is free so that the call can be received. The claimant did not answer the phone despite two separate calls to the correct number. Accordingly, the claimant did not comply with the notice to provide a telephone number at which he could be reached. The administrative law judge concluded that there is no good cause to reopen the record.

DECISION:

The decision of the representative dated June 26, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css