

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NIECHET A BARNETT
Claimant

APPEAL NO. 10A-UI-07813-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED PARCEL SERVICE
Employer

**Original Claim: 04/25/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

United Parcel Service (employer) appealed a representative's May 20, 2010 decision (reference 01) that concluded Niechet A. Barnett (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled to be held on July 19, 2010, at 10:00 a.m. The employer received the hearing notice and responded by calling the Appeals Section on July 8, 2010, indicating that Sharon Leonard would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, Ms. Leonard was not available; therefore, the employer did not participate in the hearing. The claimant responded to the hearing notice and indicated that he would participate in the hearing. When the administrative law judge contacted the claimant for the hearing, he agreed that the administrative law judge should make a determination based upon a review of the available information, including his informal statement. The record was considered closed at 10:10 am. At 10:50 a.m., the employer 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 have been reopened?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer received the hearing notice prior to the July 19, 2010 hearing. The instructions inform the parties that they are to be available at the specified time for the hearing and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The notice also specifies that use of a cell phone for the hearing is to be avoided. The reason the employer's witness was not available at the time for the hearing was that the phone provided to contact her for the hearing

was a cell phone; at about 9:30 a.m. on the day of the hearing she discovered that the battery on the phone had died, as her home power was out on July 18 and she had been unable to charge the phone. Her home power came back on before the morning of July 19, but rather than plugging in her cell phone to either seek to charge it by the time of the hearing or to operate it using direct power rather than battery power, she determined to leave her home and drive to work to contact the Appeals Section from a work phone. She did not arrive at work until shortly before 10:50 a.m., at which time she contacted the Appeal Section for the hearing.

The claimant started working for the employer on May 8, 2006. He worked full-time as a supervisor at the employer's Davenport, Iowa facility. His last day of work was March 31, 2010. He was discharged on April 28, 2010. He was not given any specific reason for his termination. The claimant had made some complaints regarding another supervisor and certain procedures he felt were not being properly followed. He understood he was being discharged in retaliation for having made the complaints, and because the employer determined the two supervisors could not work together. No specific or current incidents had happened or were reviewed with the claimant.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied. After a hearing record has been closed, the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The employer's witness was not available as required at the scheduled time for the hearing, and did not recontact the Appeals Section for the hearing until 40 minutes after the hearing had been closed. Although the employer intended to participate in the hearing, the employer failed to read or follow the hearing notice instructions. 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 employer did not establish good cause to reopen the hearing. Therefore, the employer's request to reopen the hearing is denied.

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). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 that 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 that 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).

Conduct asserted to be disqualifying misconduct must be both specific and current. Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988); West v. Employment Appeal Board, 489 N.W.2d 731 (Iowa 1992); 871 IAC 24.32(8). The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's May 20, 2010 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw