IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAHIR G MAOW
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL NO. 16A-UI-13187-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/30/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Wells Enterprises (employer) appealed a representative's December 5, 2016, decision (reference 05) that concluded Dahir Maow (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 4, 2017. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer was represented by Alyce Smolsky, Hearings Representative, and participated by Stefanie Rawles, Lead Unemployment Consultant, and Daniel Stockmaster, Human Resources Generalist. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 9, 2016, as a full-time seasonal production worker. The claimant signed for receipt of the employer's handbook on May 9, 2016. The employer did not issue the claimant any warnings during his employment.

On July 5, 2016, the claimant was ill with stomach pains. He had to go to the restroom often. He remembers telling his supervisor that he could not work, the employer questioning him, and then allowing him to go home. He returned the following day and worked. Later the employer terminated him for walking off the job without notice on July 5, 2016.

The claimant filed for unemployment insurance benefits with an effective date of October 30, 2016. The employer's representative, Stefanie Rawles, participated personally at the fact finding interview on December 2, 2016. She did not have firsthand knowledge of the events leading to the separation. The name of an employee with firsthand information was not offered for rebuttal because the employer instructed the representative to handle fact-finding interviews. The employer did not wish to take part in the interview.

The record closed at 10:19 a.m. on January 4, 2017. At 10:23 a.m. on January 4, 2017, the claimant called regarding the hearing. The claimant did not read the notice before the hearing and did not know he had to register his telephone number for the hearing.

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.

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 bureau with the names and telephone numbers of the persons who are participating in the hearing by the scheduled starting time of the hearing or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provide in Iowa Code section 17A.12(3). The record may be reopened if the absent party makes a request to reopen the hearing under subrule 26.8(3) and shows good cause for reopening 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 ex parte 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 claimant called the Appeals Section for the January , 2017, hearing was after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section prior to the hearing. 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. Intent alone is not sufficient. An intent must be accompanied by an overt act carrying out that intent. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). In the case of an appeal hearing, that overt act is to call the Appeals Section and provide a telephone number where the party may be contacted. The claimant did not do this and therefore has not established good cause to reopen the hearing. The claimant's request to reopen the hearing is denied.

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The statements gathered by the human resources generalist on the night before the hearing indicate that the employer did not remember much of the July 5, 2016, incident. They do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. This information was spoken to the generalist and, in turn, relayed to the administrative law judge by the generalist. The claimant provided a statement to the fact-finder. Neither the claimant's nor the employer's statements were given under oath. The claimant presented himself to and was questioned by the fact-finder. The employer's witnesses were not.

The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer presented a single incident of absenteeism. The claimant asserted that

the absence was due to illness. A single absence does not rise to the level of misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's December 5, 2016, decision (reference 05) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs