IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ADAM M MASTERSON
Claimant

SUBURBAN CONSTRUCTION INC
Employer

APPEAL NO. 15R-UI-06171-LDT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/05/14
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 20, 2015, reference 02, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on April 23, 2015 under 15A-UI-02768-JTT. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Nate Hoskins represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Thirteen into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

Administrative law judge Timberland issued a decision on April 27, 2015 which found the separation was disqualifying. The claimant appealed that decision to the Employment Appeal Board. On May 27, 2015 the Board remanded the matter back to the Appeals Bureau for an additional hearing so that the claimant could participate, concluding that since the claimant had attempted to call the Appeals Bureau on April 23, 2015 within an hour of the scheduled start time for the hearing that day that he had tried to participate "within a reasonable timeframe after the scheduled hearing time. The Board's decision further stated, "We caution the Claimant that, barring exceptional circumstances, we will not again excuse a failure to call in a number where the Claimant could be reached."

Pursuant to that Board decision, a new hearing was scheduled, and new notices of hearing were mailed to the parties' last-known addresses of record for a telephone hearing with the undersigned administrative law judge to be held at 8:30 p.m. on July 14, 2015. A review of the Appeals Bureau's conference call system indicates that the claimant/appellant again failed to respond to the hearing notice and provide a telephone number 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 Nate Hoskins would again participate as the employer's representative. When the administrative law judge contacted Mr. Hoskins for the hearing, he

agreed that the undersigned administrative law judge should make a determination based upon the record created on April 23, 2015, and should reinstate the decision issued by the prior administrative law judge on April 27, 2015.

The undersigned administrative law judge considered the record closed at 9:30 a.m. At 8:28 a.m. on July 15, 2015 the claimant called the Appeals Section and requested that the record be reopened.

ISSUES:

Whether the hearing record should be reopened and the hearing rescheduled?

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

The claimant contacted the Appeals Bureau after the April 23 hearing record had closed and after the employer had been dismissed from the hearing. The hearing was scheduled for 9:00 a.m. Administrative law judge Timberland immediately made two attempts to return the claimant's call. The claimant did not answer either call. Judge Timberland left two messages for the claimant. At noon on April 23, the claimant again contacted the Appeals Bureau, at a time when the administrative law judge was in another hearing. The claimant did not provide good cause for not providing a telephone number for the April 23 hearing and for not participating in the April 23 hearing as scheduled.

After the matter was remanded by the Board, the claimant was properly notified of the rescheduled hearing on this appeal. The claimant received the hearing notice shortly after it was mailed on June 4, 2015. The hearing notice instructions specifically advise parties, "If you do not participate in the hearing because you do not register for the hearing, register late, or cannot be reached at the number you provided when the judge calls for the hearing, the appeal may be dismissed or decided based on other available evidence." The claimant asserted that he had immediately gone online to register his name into the Appeals Bureau's conference call system. However, when a party registers a number into the conference call system, the system generates a "C2T Online Registration" confirmation report which appears on the party's computer screen; the report contains a recitation of the information which was registered, the date and time the registration was made, and provides the party with a confirmation number. The screen then specifies: "Please print this page or take a note of this number and keep it in a safe place." The claimant did not have this confirmation number. This administrative law judge concludes that while the claimant may have intended to go online and register his number in early June, in fact he failed to do so.

While the claimant acknowledged that he was aware of the hearing scheduled for 8:30 a.m. on July 14, when he did not get a call for the hearing on that day and time he did not promptly call the Appeals Bureau to inquire as to what the problem might be because he did not remember

that the hearing was scheduled for that day and time until sometime 5:00 p.m. or later on July 14.

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer was employed as a full-time construction crew member from November 25, 2014 until January 30, 2015, when the employer discharged him from the employment in connection with a profane outburst directed at his immediate supervisor. On January 29, 2015, the employer met with the claimant for the purpose of disciplining him for disregarding the supervisor's directive not to damage the casing on windows the claimant was installing. The claimant had destroyed the window casing and the employer incurred additional expense to provide new casing to its customer. The reprimand had also been based on the claimant engaging in disrespectful, offensive behavior directed at the supervisor, which behavior occurred in the presence of the employer's customer. The employer noted in the reprimand that the claimant had violated several written work rules. Immediately following the disciplinary meeting, the claimant confronted his supervisor. The claimant called the supervisor a "cocksucker" and a "dick." In addition, the claimant said, "Fuck this place." The next day the employer met with the claimant and discharged him from the employment. The conduct occurred in front of one or more other employees.

The claimant established an additional claim for benefits that was effective February 8, 2015 and received $2,270.00 in benefits for the ten-week period of February 8, 2015 through April 18, 2015.

The employer participated in the fact-finding interview. The employer provided an oral statement to the claims deputy and submitted exhibits for the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedure Act at Iowa Code section 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.

Iowa Admin. Code r. 871 IAC 26.14(7) provides:

> 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 provided 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.

Due process requires notice and an opportunity to be heard, both of which were provided to the parties. This rule does not provide exceptions for good intentions and/or a party contacting the Appeals Bureau within a reasonable amount of time after the hearing is scheduled. It could be generally assumed a party intends to participate in the hearing, but the party's responsibility does not end there; all parties are required to follow the specific written instructions printed on the hearing notice. Due process does not require the other party and the administrative law judge to sit and wait for indefinite periods see if a party wishes to participate in the appeal hearing. The party is held solely responsible for going acting in an expeditious manner. Here, upon the matter being remanded by the Board for a new hearing, as a courtesy, the claimant was granted additional time not required by statute or rule, and the record was held open for an hour after the scheduled time for the hearing. Here, notwithstanding the additional time, the notice and the opportunity to participate, the claimant failed to participate.

The first issue in this case is whether the claimant‘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. Iowa Admin. Code r. 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. Iowa Admin. Code r. 871 IAC 26.14(7)c.

The first time the claimant actually contacted the Appeals Bureau for the July 14, 2015 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 register his number with the Appeals Bureau 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. A decision should not be set aside where the movant ignores plain mandates with ample opportunity to comply. See Houlihan v. Emp't Appeal Bd., 545 N.W.2d 863 (Iowa 1996). Here the plain and simple mandate is to read the hearing notice and register a telephone number into the conference call system so that the party can be reached. The second simple and obvious mandate is to be available at the number provided at the specified time for the hearing. Lastly, the reasonable expectation is that a party should call the Appeals Bureau within

a few minutes after the start time for the hearing if the party does not get a call at the scheduled time. Here, the claimant did not call the Appeals Bureau until the next business day after the scheduled hearing. This delay was not reasonable; rather, the administrative law judge concludes that the claimant has engaged in a pattern of delay. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge

considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The patently offensive language that the claimant directed at the supervisor was a personal attack on the supervisor and on the supervisor's authority to direct the claimant's work. The claimant's conduct constituted misconduct in connection with the employment. The fact that conduct that triggered the discharge followed a similar incident the day before is an aggravating factor. That the fact that both incidents occurred in the presence of other people is an aggravating factor. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid $2,270.00 in benefits for the ten-week period of February 8, 2015 through April 18, 2015.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The February 20, 2015, reference 02, decision is reversed. The claimant was discharged on January 30, 2015 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured

work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid $2,270.00 in benefits for the ten-week period of February 8, 2015 through April 18, 2015. The claimant must repay the benefits. The employer's account will be relieved of liability for benefits, including relief of liability for benefits already paid.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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