

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAWRENCE T MITCHELL

Claimant

APPEAL NO: 09A-UI-04728-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 02/22/09

Claimant: Respondent (2/R)

Section 96.5-1 – Voluntary Leaving
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer)) appealed a representative's March 18, 2009 decision (reference 01) that concluded Lawrence T. Mitchell (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 held on April 21, 2009. The claimant received the hearing notice and responded by calling the Appeals Section on March 27, 2009. He indicated that he 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, the claimant was not available; therefore, the claimant did not participate in the hearing. Tim Speir of Unemployment Insurance Services appeared on the employer's behalf and presented testimony from three witnesses, Jim Fitzgerald, Donna Wesley, and Josh Asche. The record was closed at 1:24 p.m. At 2:11 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the employer, 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 be reopened? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the April 21, 2009 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. Contrary to the recommendation on the hearing notice instructions, the claimant's phone was a cell phone. When he spoke to the administrative law judge after recontacting the Appeals Section, he speculated that he had not heard his phone ringing because it may have been malfunctioning. When questioned as to why

he had not followed the instructions that were given to him on March 27 that he was to call back to the Appeals Section if he had not heard from the judge by five minutes after the scheduled start time for the hearing, he indicated he might have been asleep due to going to the emergency room the prior night for an hand injury, for which he had been given some pain medication that made him drowsy. He did not have an explanation as to why he had not set some type of alarm to awaken him for the 1:00 p.m. hearing before he went to sleep.

The claimant started working for the employer on June 5, 2008. He worked full time as a meat service manager at one of the employer's Des Moines, Iowa stores. He normally worked 11:00 a.m. to 7:00 p.m., with his scheduled days off being Tuesday and Sunday. His last day of work was December 10, 2008, a Wednesday. He was a no-call/no-show for his scheduled work on December 11, December 12, December 13, and December 15. On Wednesday, December 17, he came in to the store as if to report to work as scheduled at 11:00 a.m. When questioned by Mr. Fitzgerald, the meat department manager, the claimant asserted that he had advised various members of management that he was undergoing some medical tests. However, Mr. Fitzgerald questioned the management team members and none of them had received any contact or information from or regarding the claimant undergoing any medical testing.

The employer has a policy under which a three-day no-call/no-show is considered to be a voluntary quit by job abandonment. The claimant was on notice of that policy. Because of that policy and the claimant's more than three-day no-call/no-show, the employer had determined the claimant had abandoned his employment and considered his employment ended.

The claimant established a claim for unemployment insurance benefits effective February 22, 2009. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,696.00.

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. 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 claimant was not available when the administrative law judge called at the scheduled time for the hearing as directed by the hearing notice instructions. He did not call the Appeals Section back until about 45 minutes after the hearing had been closed and over an hour after the scheduled time for the hearing. Failing to ensure that he would awaken and hear his phone for the hearing due to taking pain medication or to ensure that his cell phone was working is not a good cause to reopen the record. 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. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

If the claimant voluntarily quit his employment, he is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. However, an intent to quit can be inferred in certain circumstances. For example, a three-day no-call/no-show in violation of company rule is considered to be a voluntary quit. 871 IAC 24.25(4). The claimant did exhibit the intent to quit and did act to carry it out as he was more than a three-day no-call/no-show contrary to the company policy of which he was on notice. The claimant would be disqualified for unemployment insurance benefits unless he voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. The claimant has not satisfied his burden. Benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's March 18, 2009 decision (reference 01) is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. As of December 17, 2008, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css