

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL L HORTON
Claimant

LANCE PRIVATE BRANDS LLC
Employer

APPEAL NO. 13A-UI-12249-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/29/13
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness
871 IAC 24.32(8) – Current Act of Misconduct
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated October 24, 2013, reference 01, that held he was discharged for excessive unexcused absenteeism and tardiness on October 7, 2013, and benefits are denied. A hearing was scheduled for November 21, 2013. The claimant and the employer did not participate.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having considered the evidence in the record finds that: The claimant was hired on March 24, 2011 and last worked as a full-time machine technician on October 2, 2013. The claimant received the employer attendance policy that provides an eight point accumulation with one year is termination. The employer terminated claimant for pointing-out. He offered at department fact finding his last absence was due to being sick.

Claimant failed to respond to the hearing notice prior to the hearing but made a late call to UI Appeals ten minutes after the scheduled time. He failed to follow the notice call in instruction.

The employer representative Karen Taylor was called twice at the phone number provided and she was not available.

REASONING AND CONCLUSIONS OF LAW:

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.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The claimant's request for a hearing was denied due to his late call and his pre-hearing failure to call in and follow the hearing notice instruction. This is not a good cause to reopen the record.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on October 2, 2013, for excessive "unexcused" absenteeism. The employer failed to participate in this hearing and offer evidence of job disqualifying misconduct.

Claimant offers his last illness was due to being sick and the employer did not participate to refute it. This is an excusable reason for missing work and not a current act of misconduct.

DECISION:

The decision of the representative dated October 24, 2013, reference 01, is reversed. The claimant was discharged for a current act of misconduct in connection with employment on October 2, 2013. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css