IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JILLIAN L WAITE
Claimant

HY-VEE INC
Employer

APPEAL NO: 12A-UI-13437-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/14/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge
Section 17A.12-3 – Non-appearance of Party
871 IAC 26.8(5) – Decision on the Available Information

STATEMENT OF THE CASE:

Jillian L. Waite (claimant) appealed a representative's October 29, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Hy-Vee, Inc. (employer). A hearing was initially scheduled for December 10, 2012; at the claimant's request that hearing was postponed and rescheduled to January 9, 2013, so that a witness the claimant wished to have subpoenaed could be available. When the administrative law judge sought to contact the claimant at the telephone number she had provided, the call went directly into voice mail, apparently because of an incompatibility between the conference call system and the claimant's cell phone. Although the usage of cell phones for hearings is discouraged in the instructions on the hearing notice, because the administrative law judge could not connect the claimant into the hearing even though the claimant was physically available, the administrative law judge agreed to again reschedule the hearing. However, the claimant was informed that it would be her responsibility to ensure that she was at a working phone at the next scheduled time for the hearing, and that she should make arrangements to use a land line.

The hearing was then rescheduled for 2:00 p.m. on February 6, 2013. The claimant did not provide a new telephone number at which she could be reached for the hearing. When at the scheduled time for the hearing, the administrative law judge called the cell phone number which had previously been provided, the call again went directly into voice mail. The claimant did not respond to the message left by the administrative law judge, and was not available for the hearing. Therefore, the claimant did not participate in the hearing. The employer responded to the hearing notice and indicated that Sabrina Bentler of Corporate Cost Control would participate as the employer's representative with two employer witnesses, as well as the employee whom the claimant had subpoenaed. When the administrative law judge contacted Ms. Bentler for the hearing on February 6, she agreed that the administrative law judge should make a determination based upon a review of the information from the fact-finding interview and an informal sworn statement by Todd Robertson to clarify some points from the fact-finding interview. Based on the appellant's failure to participate in the hearing, the available information, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits denied.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. 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 claimant failed to be available at the scheduled day and time set for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

The claimant started working for the employer on April 6, 2010. She worked part time as a clerk the employer's Mason City, Iowa store. Her last day of work was August 9, 2012. The employer discharged her on that date. The stated reason for the discharge was attempted theft.

The employer has a practice of offering sealed "grab bags" of discontinued product to customer's for $3.00. The customers do not know what products are in the bags at the time of purchase, but the value of the items in the bags is typically about $20.00 to $25.00.

While on duty during her shift on December 8, although the job of assembling grab bags had been assigned to someone other than the claimant, she took it upon herself to pick through some of the discontinued items that were going to be distributed amongst some grab bags; she put them into a "grab bag" for herself. She then placed the "grab bag" behind the customer service counter marked as for her, with the intention of returning the next day and purchasing the "grab bag" for $3.00. The value of the items she placed into the special "grab bag" was between $100.00 and $120.00. When the claimant came in on August 9 the employer confronted her about the situation and then discharged her.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedures Act § 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.

871 IAC 26.8(3), (4) and (5) provide:

> Withdrawals and postponements.
>
> (3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.
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> (4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.
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> (5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

A decision should be made on the basis of the available information, specifically; the information from the fact-finding interview and the informal sworn statement by Mr. Robertson.

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); Iowa Code § 96.5-2-a.

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 which 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 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. 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).

The claimant's attempted theft shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the

employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's October 29, 2012 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 9, 2012. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs