

**IOA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAYO K AREGBE
Claimant

APPEAL NO. 13A-UI-05011-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEVELOPMENTAL SVCS OF IOWA
Employer

OC: 03/31/13
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 25, 2013 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 4, 2013. Claimant participated. Employer did not respond to the hearing notice instruction and did not participate. The employer called after the hearing record had been closed, and had not followed the hearing notice instructions pursuant to Iowa Admin. Code r. 871-26.14(7)a-c.

ISSUES:

Should the hearing record be reopened?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The parties were properly notified of the scheduled hearing on this appeal. The employer failed to provide a telephone number at which a representative could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer received the hearing notice prior to the hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the employer directly contacted the Appeals Section was on June 4, 2013, after the scheduled start time for the hearing and after the record had been closed. The employer had not read or followed the informational instructions on the hearing notice and had assumed a former coworker had called but did not call the Appeals Bureau to verify. The phone clerks conducted a search of their call logs and found no record of the employer calling in response to the hearing notice instructions.

Claimant was employed full time as a direct support professional for clients with intellectual disabilities and was separated from employment on April 4, 2013. He was tardy March 31 because he changed a flat tire on the way to work. There is no documentary evidence of

attendance issues in the administrative record. On April 4 client Joey complained to supervisor Alisa that claimant used his phone charger. Claimant had the same kind of phone charger as Joey so the client was confused when claimant retrieved that and other items from his room as requested. Claimant did not argue with Alisa but tried to tell her he was upset she believed the client over him. He had asked if he could use the phone in an emergency about his children. He took the client to the library as requested but the client changed his mind midway there and the client wanted to go with another client to another house. He told the client to call the supervisor because he was supposed to stay with the client. There was no documentation of prior warnings in the administrative record (fact-finding interview notes).

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied.

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.

The first time the employer called the Appeals Section for the hearing was after the record had been closed. Although the employer may have intended to participate in the hearing, the employer failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed 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 employer did not establish good cause to reopen the hearing. Therefore, the employer's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

871 IAC 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. ___-___, Iowa Ct. App. filed ___, 1986).

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer did not participate or offer documentary evidence at the fact-finding interview, the administrative law judge concludes that the employer has not met its burden of proof. The claimant's testimony is credible and his actions were reasonable given the circumstances. Benefits are allowed.

DECISION:

The April 25, 2013 (reference 01) decision is reversed. The record shall not be reopened. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css