

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARK A BRUSH**

Claimant

**APPEAL NO: 12A-UI-05315-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**

Employer

**OC: 04/15/12**

**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits  
871 IAC 26.14(7) – Late Call

**STATEMENT OF THE CASE:**

West Liberty Foods, L.L.C. (employer) appealed a representative's May 3, 2012 decision (reference 01) that concluded Mark A. Brush (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 May 30, 2012. The claimant 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. Nikki Bruno appeared on the employer's behalf. The record was closed at 10:22 a.m. At 10:38 a.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 the claimant discharged for work-connected misconduct?

**OUTCOME:**

Reversed. Benefits denied.

**FINDINGS OF FACT:**

The claimant received the hearing notice prior to the May 30, 2012 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 claimant directly contacted the Appeals Section was on May 30, 2012, 38 minutes after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice, and had assumed that the Appeals Section would initiate the telephone contact even without a response to the hearing notice.

The claimant started working for the employer on March 16, 2010. He worked full-time as a maintenance mechanic at the employer's West Liberty, Iowa, turkey processing facility. He worked on a 6:00 p.m.-to-6:00 a.m. shift on a rotating schedule. His last day of work was April 8, 2012. The employer suspended him April 12 and discharged him on April 13, 2012. The stated reason for the discharge was seeking to report for work under the influence after a prior warning.

After an incident on May 12, 2010, where the employer determined the claimant had reported for work smelling of alcohol and was concerned that he had reported for work under the influence of alcohol, contrary to the employer's policies, the employer gave the claimant a written warning on May 17, 2010 advising him that he would be discharged if there was a similar incident in the future.

After working April 8, 2012, the claimant was next scheduled to work at 6:00 p.m. on April 11. He picked up a coworker to take to work, but before arriving at the employer's premises they were pulled over by law enforcement personnel. The claimant was arrested and taken to jail, and was charged with driving under the influence (DUI). The coworker was allowed to take the claimant's car and continued on to work, where he reported what had happened and that the claimant would be absent from work that night. When the claimant sought to report for work on April 12, he was sent home on suspension pending further investigation. He came in for a meeting with the employer on April 13. He indicated that he had refused to submit to an alcohol test when he was stopped by the law enforcement personnel, but admitted that between 12:00 p.m. and 2:00 p.m. he had consumed "a few beers." He subsequently indicated that he was fighting the DUI charge. As of the date of the hearing, the employer was unaware of what the status was of the DUI charge.

The employer concluded that the claimant had attempted to report for work under the influence on April 11 in violation of the employer's policies and of the warning he had been given on May 17, 2010. As a result, the employer determined to discharge the claimant.

The claimant established a claim for unemployment insurance benefits effective April 15, 2012. The claimant has received unemployment insurance benefits after the separation.

#### **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 first time the claimant called the Appeals Section for the May 30, 2012 hearing was after the hearing had been closed. Although the claimant intended to participate in the hearing, he 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.

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 that 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 that 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).

While there is some question as to whether the claimant was ultimately found to be under the influence of alcohol in the criminal proceeding, there is a different standard of proof applicable to the criminal proceeding than the standard of proof applicable to this proceeding. The fact that a member of law enforcement observed sufficient behavior on the part of the claimant to at least charge him with DUI coupled with the claimant's admission that he had consumed "a few beers" earlier in the afternoon, without any contrary evidence from the claimant, is sufficient to establish by a preponderance of the evidence—that it is "more likely than not"—that the claimant did attempt and intend on reporting to work under the influence on April 11 contrary to the employer's policies and contrary to the warning he had previously been given. The claimant's actions on April 11 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.

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 claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

**DECISION:**

The representative's May 3, 2012 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 13, 2012. This disqualification continues until the claimant has been paid ten times he weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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