

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DERICK M SANDERS**  
Claimant

**APPEAL NO: 12A-UI-00686-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE HON COMPANY**  
Employer

**OC: 12/11/11**

**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge  
871 IAC 26.14(7) – Late Call

**STATEMENT OF THE CASE:**

Derick M. Sanders (claimant) appealed a representative's January 11, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from The Hon Company (employer). Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 2:00 p.m. on February 14, 2012. The claimant received the hearing notice and responded by calling the Appeals Section on January 27, 2012. 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, he did not participate in the hearing. The employer responded to the hearing notice and indicated that Deniece Norman of Employer's Edge would participate as the employer's representative with one witness. When the administrative law judge contacted the employer for the hearing, Ms. Norman agreed that the administrative law judge should make a determination based upon a review of the available information. The administrative law judge considered the record closed at 2:10 p.m. At 2:18 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on a review of the available information 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:**

Affirmed. Benefits denied.

**FINDINGS OF FACT:**

The claimant received the hearing notice prior to the February 14, 2012 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. The appellant 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 reason he was not available was that he had come home from work to take the call for the hearing and had changed clothes and then cared for his infant son. He was unaware that his three-year-old son had run off with his phone, and so the claimant did not hear the phone when the administrative law judge called for the hearing.

The claimant started working for the employer on May 17, 2004. He worked full time as a loader/shipper at the employer's warehouse. His last day of work was on or about November 29, 2011. The employer discharged him on December 7, 2011. The stated reason for the discharge was having a positive drug test in violation of the employer's drug policy.

The employer has a written drug testing policy of which the claimant was on notice. The claimant had been drug tested in 2010 as a result of a workplace accident, and had failed that test. The employer allowed the claimant to continue his employment under a post-treatment return to work agreement which he signed on January 29, 2010. That agreement allowed post-treatment drug testing at the employer's discretion, and provided for discharge for a subsequent positive test. On November 18, 2011 the employer directed the claimant to submit to a drug test. On November 29 the employer learned that the sample had come back after confirmatory testing positive for marijuana. The employer provided the claimant a notice of the findings which also informed him of his right to have his sample re-evaluated at a laboratory of his choosing and at his cost within seven days; the claimant received the notice. The claimant did not have the sample re-evaluated, so the employer discharged the claimant effective December 7.

#### **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 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.



The claimant was not available at the scheduled time for the hearing and did not call the Appeals Section back for the 2:00 p.m. hearing on February 14, 2012 until after the record had been closed. Although the claimant intended to participate in the hearing, he failed to read or follow the hearing notice instructions to be available at the scheduled time for 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 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).

In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). The *Eaton* court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558. The drug testing law allows for drug testing in the case of a workplace accident "resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars." Iowa Code § 730.5(8)(f). The 2010 testing complied with this provision. The drug testing law also allows for testing "during, and after completion of, drug or alcohol rehabilitation." Iowa Code § 730.5(8)(b). The employer gave the claimant the required opportunity to have the retained split portion of the sample re-evaluated at his own expense at a laboratory of his choice. Iowa Code § 730.5(7)(i)(1).

The employer complied with the drug testing laws. A preponderance of the evidence establishes the claimant violated the employer's drug policy. The claimant's positive drug test 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 January 11, 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 December 7, 2011. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he 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