

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SARA A WARE**

Claimant

**APPEAL NO. 10A-UI-06152-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARGILL MEAT SOLUTIONS CORP**

Employer

**Original Claim: 03/21/10**

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

Section 96.5-2-a – Discharge  
Section 96.5-1 – Voluntary Leaving  
Section 96.3-7 – Recovery of Overpayment of Benefits  
871 IAC 26.14(7) – Late Call

**STATEMENT OF THE CASE:**

Cargill Meat Solutions Corporation (employer) appealed a representative's April 16, 2010 decision (reference 01) that concluded Sara A. Ware (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 June 15, 2010. The claimant received the hearing notice and responded by calling the Appeals Section on May 21, 2010. She indicated that she 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, she did not participate in the hearing. Jessica Sheppard appeared on the employer's behalf. The record was closed at 12:22 p.m. At 12:23 p.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?

**FINDINGS OF FACT:**

The claimant received the hearing notice prior to the June 15, 2010 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 reason the claimant was not available when the administrative law judge attempted to call her for the hearing was that she was dealing with a disciplinary issue with her children.

The claimant started working for the employer on October 31, 2000. She worked full-time as a production worker on the first shift at the employer's Wapello County, Iowa, pork processing facility. Her last day of work was March 25, 2010. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point attendance policy. As of December 23, 2009, the claimant was at 10.5 points. Five of those points were due to illness, five were for "other" reasons, and .5 was for a tardy. As a result of reaching 10.5 points, the claimant was placed on a "last chance agreement" under which she could have no more occurrences until June 23, 2010.

On March 25, 2010, the claimant was about 37 minutes late for work; the reported reason was car trouble. Due to this violation of the last chance agreement, the claimant was discharged.

The claimant grieved the discharge. As a result of the grievance, a settlement was reached in which the claimant was reinstated as of May 12, 2010. However, the claimant was a no-call, no-show for work beginning May 13, 2010 and dates thereafter. The employer therefore concluded that she was abandoning her position.

The claimant established a claim for unemployment insurance benefits effective March 21, 2010. 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 is not good cause for reopening the record. 871 IAC 26.14(7)c.

The claimant was not available for the hearing at the time for the hearing; she did not recontact the Appeals Section until after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and to be available at the specified time for the hearing. Disciplining one's children is not good cause for not being available at the scheduled time for 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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Absences or tardies due to issues that are of purely personal responsibility, specifically including transportation issues, are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant's final occurrence was not excused and was not due to illness or other reasonable grounds. She did have prior excessive unexcused occurrences. The claimant had previously been warned that future occurrences could result in termination. The employer discharged the claimant for reasons amounting to work-connected misconduct. Higgins, supra.

There is some additional question raised by the fact that the employer attempted to reinstate the claimant after the initial separation, but the claimant then failed to remain in that employment. The reinstatement could either be viewed as converting the prior discharge to a disciplinary suspension, or as a rehire. Treated as a suspension, the same provisions of law apply to a disciplinary suspension as to a discharge, so the same result as reached above would follow. 871 IAC 24.32(9). If it was a rehire after what has been determined to be a disqualifying separation, the claimant would still have to requalify for unemployment insurance benefits after the prior separation from employment in order to be eligible to receive benefits.

Further, it appears that the claimant has voluntarily quit her position by job abandonment after the reinstatement. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The intent to quit can be inferred in certain circumstances. For example, failing to report and perform duties as assigned is considered to be a voluntary quit. 871 IAC 24.25(27). The claimant did exhibit the intent to quit and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause. Iowa Code § 96.5-1. The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. The claimant has not satisfied her burden. Benefits would be denied as of May 12, if she was not subject to the prior disqualification.

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 April 16, 2010 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of March 25, 2010. This disqualification continues until she 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. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

---

Lynette A. F. Donner  
Administrative Law Judge

---

Decision Dated and Mailed

ld/kjw