

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARON E BRANCH

Claimant

APPEAL NO: 11A-UI-02760-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 02/06/11

Claimant: Appellant (1)

Section 96.5-2-a – Discharge
§ 17A.12-3 – Non-appearance of Party
871 IAC 25.8(5) – Decision on the Record
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated March 2, 2011 (reference 01) which concluded Laron E. Branch (claimant/appellant) was not eligible for unemployment insurance benefits after a separation from employment from Wal-Mart Stores, Inc. (employer/respondent). Notices of hearing were sent to both parties' last-known addresses of record for a telephone hearing to be held at 10:00 a.m. on March 30, 2011. The claimant/appellant 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. The employer's representative received the hearing notice and responded by calling the Appeals Section on the date of the hearing to indicate that Tracy Ryan 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, Ms. Ryan was not available; therefore, the employer did not participate in the hearing. The administrative law judge considered the record closed at 10:17 a.m. At 12:55 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the appellant's failure to participate in the hearing, the administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Should the representative's decision be affirmed on a basis of a review of the available information, or should the hearing record have been reopened?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the March 30, 2011 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 March 30, 2011, nearly three hours after the scheduled start time for the hearing. The claimant acknowledged he 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 October 8, 2008. He worked part time as an associate in the meat department at the employer's store. His last day of work was February 7, 2011. The employer discharged him on that date. The stated reason for the discharge was taking an excessive break without authorization and then providing false information regarding the incident.

Associates are allowed to take a 15-minute break. On January 20, 2011 the claimant took a 50-minute paid break. During that time he cashed his check in the store, left the store through the lawn and garden entrance, got into his car and left the premises, got gas, came back and reentered the store through the lawn and garden entrance, then went to the restroom, then finally returning to work. Shortly thereafter he was questioned about his absence, telling two different persons he had been in the lawn and garden department and denying how long he had been away. The employer subsequently verified his absence from the store through video surveillance. Partially because of the unauthorized break, but primarily due to the claimant's dishonesty when confronted about his absence, the employer discharged the claimant.

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.

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.

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 March 30, 2011 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 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 unauthorized extended paid break but primarily his dishonesty to the employer during the investigation 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. White v. Employment Appeal Board, 448 N.W.2d 691 (Iowa 1989). The employer discharged the claimant for reasons amounting to work-connected misconduct. Benefits are denied.

DECISION:

The unemployment insurance decision dated March 2, 2011 (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from

receiving unemployment insurance benefits as of February 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs