

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER R FALL

Claimant

APPEAL NO: 18A-UI-10082-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMPLETE BUILDING SERVICES INC

Employer

OC: 09/02/18

Claimant: Respondent (2)

Iowa Code § 96.6(2) – Timeliness of Appeal

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

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the September 19, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 22, 2018. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Jackie Burken, part-owner. Kevin Burken, part-owner, also testified.

The administrative law judge took official notice of the administrative records including the fact-finding documents and initial decision. Department Exhibit D-1 (Appeal) was admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

NOTE TO EMPLOYER:

If you wish to confirm or change the address of record, please access your account at: <https://www.myiowaui.org/UITIPTaxWeb/>.

ISSUES:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a janitor and was separated from employment on August 23, 2018, when she was discharged.

The claimant was discharged based upon a report of theft from the employer's client. The claimant, as a janitor had three clients in a building that the claimant was responsible for cleaning. She had keys to enter after hours into each of the clients' facilities. The claimant last performed work on August 22, 2018. The employer was notified by one of the clients the next day that it was terminating its cleaning contract based upon \$59.00 being removed from the safe located in its building. The client reported that when it returned to the office, the blinds had been pulled down, even though they were supposed to be up, that the safe had been opened, a key to the safe had been stored in the office desk, and that there were no signs of forced entry.

When the employer attempted to contact the claimant about the incident, she was unresponsive. The employer sent the claimant's manager to her house to retrieve the employer keys. As a result of the claimant's conduct, the employer lost three accounts within the building where the money was removed and never recovered.

Prior to the final incident, the claimant had confided in the employer that she was financially strapped and the employer had been advancing her money. There had also been an incident on May 17, 2018, when the employer's client reported the removal of a phone charger from a desk, in an office the claimant was cleaning. When confronted, the claimant stated she had accidentally picked it up, and two days later, the phone charger reappeared on the desk. In the absence of an explanation for the client's complaint of theft on August 22, 2018, the employer discharged her. The claimant did not attend the hearing to refute the employer's testimony.

An initial unemployment insurance decision (Reference 01) resulting in the claimant being allowed benefits was mailed to the employer's last known address of record on September 19, 2018. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by September 29, 2018. Because September 29, 2018 was a Saturday, the final day to appeal was extended to October 1, 2018.

The address used for mailing was 1126 South 32nd Street, Clinton, Iowa 52732. This was not a valid address for the employer, who had changed its address three years prior. Ms. Burken stated she had notified Iowa Workforce Development when the address changed and had received subsequent notifications from Iowa Workforce Development such as the quarterly statements, after the move. For unknown reasons, the initial decision was mailed to the old address. The fact-finding interview notice was also mailed to this address.

Due to the incorrect address being used, the employer received the decision October 1, 2018 and attempted to file an appeal online the same day (Department Exhibit D-1). When she did not receive a confirmation email, she followed up with IWD and submitted the appeal a second time on October 4, 2018 (Department Exhibit D-1).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$540.00, since filing a claim with an effective date of September 19, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Because the fact-finding interview was mailed to the employer's address, it was not alerted to the interview until after the date, when the new residents informed Ms. Burken on mail. The administrative records reflect a voicemail was provided and the number called was Ms. Burken's cell phone. However, she denied receipt of any voicemail.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is timely.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The record shows that the appellant did not have a reasonable opportunity to file a timely appeal. The employer did not have an opportunity to appeal the fact-finder's decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). For unknown reasons, the initial decision was mailed to an old employer address, which delayed notification to the employer. Once received, the employer attempted to file a timely appeal online but it was not received (Department Exhibit D-1). Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Honesty is a reasonable, commonly accepted duty owed to the employer. The employer in this case had previous suspicion of theft based upon the claimant's conduct on May 17, 2018. The claimant remained employed but was also receiving loans by way of advancing her paycheck after informing the employer she was financially struggling.

When the employer received a complaint from its client, who the claimant had provided janitorial services to the night before, that it was missing money, the employer attempted to contact the claimant for an explanation to no avail. In the absence of an explanation, and refusal to discuss the incident, the employer reasonably concluded the claimant was responsible for the theft. The claimant in this case did not attend the hearing or offer any evidence to contradict the allegation of theft, and employer's account of her discharge. Accordingly, the administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

The final issue to address is whether the claimant has been overpaid benefits and has to repay the benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to

participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The claimant has been overpaid benefits in the amount of \$540.00. 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 if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

Here, the employer did not receive the notice of fact-finding interview or voicemail from a deputy. The notice of fact-finding interview was mailed to the employer's old address. Benefits were not allowed because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were allowed because the employer did not receive the notice of fact-finding interview or phone call to participate in the fact-finding interview. The employer thus cannot be charged. Since neither party is to be charged, any potential charges for this claim should be absorbed by the fund.

Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the benefits she received.

DECISION:

The September 19, 2018, (reference 01) decision is reversed. The employer's appeal is timely. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid \$540.00 in unemployment insurance benefits but is not required to repay the benefits. The employer's account is relieved of charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn