BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

VICTORIA ARCHER

Claimant

and

IOWA FAITH & FREEDOM COALITION

Employer

HEARING NUMBER: 17BUI-03082

EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.6-2, 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant The issue of timeliness was raised on appeal when the Claimant filed the appeal to the Board beyond the deadline. The Board finds good cause for the untimely appeal, and considers it as timely.

appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Victoria Archer (Claimant) was employed part time by Iowa Faith & Freedom Coalition (Employer), most recently as an administrative assistant, from July 29, 2014, until February 15, 2017, when she was discharged. The great majority of the Claimant's job duties were performed from her home.

The Claimant was not aware of any expectation that she would as a condition of her employment

be required to remain a resident of central Iowa. The Employer knew that for many months prior to her discharge that the Claimant was not coming in to the office on a weekly basis. The Employer was also aware that during this time the Claimant traveled out-of-state due to an ailing family member.

In July 2016, Claimant's performance for the employer began declining. During a telephone call on January 27, 2017 the Employer learned that the Claimant had move out-of-state. The Claimant had traveled between California and Arizona between August 2016 and February 2017. Claimant remained in possession of the Employer's property that she had been given for her work-from-home position and took this property with her when she left the state.

During the February 4, 2017, Board of Directors meeting, Scheffler notified the group that Claimant was no longer employed by the employer. Over the next approximately two weeks, Claimant communicated with Scheffler and Hurt regarding some projects she was wrapping up, as well as the Employer's property Claimant still possessed and a paycheck Claimant was owed.

Claimant testified that she mailed her appeal letter and supporting documentation before the deadline. She knew the deadline and was determined to submit her appeal in a timely manner. Claimant testified that she also submitted the appeal electronically, though Claimant's documentation indicates that she may have sent the electronic appeal to the Benefits Bureau instead of the Appeals Bureau. The appeal in the record was stamped received on March 17, but the enclosing envelope is missing from the record. The date on the appeal document is March 12.

REASONING AND CONCLUSIONS OF LAW:

Timeliness:

Iowa Code 96.6 provides:

> 2. *Initial determination.* … 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service,* 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job* Service, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission,* 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which

states that "the submission of any …appeal…not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."

The key question in this matter is when was the appeal "filed." The rule refers not to the physical act of mailing but to the postmark:

> 26.4(2) An appeal from an initial decision concerning the allowance or denial of benefits shall be filed, by mail, facsimile or in person, not later than ten calendar days, as determined by the postmark or the date stamp, after the decision was mailed to the party at its last-known address….

871 IAC 26.4(2). The rule makes clear that when the appeal is sent by mail the date of filing is the date of the postmark and not the date of physically placing the appeal in the mail. This rule is read in conjunction with the more general rule:

> 24.35(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
>
> a. If transmitted via the United States postal service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

871 IAC 24.35(1)"a". This rule provides additional guidance to determining the date of mailing. Under 24.35(1)"a" if the postmark is not legible, or not extant, then a postage meter mark is to be used. If there is no legible postage meter mark then the rule states the date of mailing is "the date entered on the document as the date of completion". Here the Claimant entered March 12 as the date of completion. Since this was the deadline we agree with the Administrative Law Judge that the appeal was timely.

Quit Versus Termination: We concur with the Administrative Law Judge's view that the Claimant was discharged. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's testimony that she did not intend to quit. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board,* 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board,* 492 N.W.2d 438 (Iowa App. 1992). The Claimant therefore did not quit. We thus analyze whether the Employer has shown disqualifying misconduct.

Misconduct: Iowa Code Section 96.5(2)(a) (2016) provides:

> *Discharge for Misconduct*. If the department finds the individual has been

discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

> *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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The law limits disqualification to current acts of misconduct:

> *Past acts of misconduct*. While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB,* 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS,* 373 N.W.2d 509, 510 (Iowa App. 1985). "[T]he purpose of [the current act] rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts." *Milligan v. EAB,* 10-2098, slip op. at 8 (Iowa App. June 15, 2011). The current act rule also assures that the termination is the result of intentional action. For example, the doctrine assures that an employee who gets sick is not denied benefits simply because he has exceeded the allowable absences under a "point system" for attendance. In determining whether a discharge is for a current act, we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination, or at least of notice to the

employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the Employer. *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given); *Milligan v. EAB*, 10-2098 (Iowa App. June 15, 2011).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Claimant testimony that she was not told that she must remain a resident of central Iowa as a condition of her employment.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

It is not enough to be denied benefits that you act contrary to policy. You have to know you are acting contrary to policy. *E.g. Infante v. IDJS*, 364 N.W.2d 262, 265 (Iowa App. 1984). The violation, in other words, must be a willful or wanton disregard of an employer's interest. 871 IAC 24.32(1)(a). For example, in *Peck v. Employment Appeal Bd*., 492 N.W.2d 438 (Iowa App., 1992) the Court found that since the employer's handbook gave three days of unexcused absences the claimant could not be disqualified for only one such absence. In *Henry v. Iowa Dept. of Job Service*, 391 N.W.2d 731 (Iowa App. 1986) an employee had mishandled cash register receipts. The Court found that since the employer had no manual explaining its rules on handling cash, then the employer had failed to show that the claimant's "actions were motivated by anything other than a good faith misunderstanding of this rule and did not amount to deliberate disregard." *Henry* at 737. In the absence of a policy then specific warnings may, of course, provide the necessary notice for a finding of willful misconduct. *E.g. Flesher v. IDJS*, 372 N.W.2d 230, 232 (Iowa 1985). In this case we have no warnings that are relevant to the issue of moving out of state. Finally, some situations are so obviously contrary to the employer's interests that prior notice is not necessary. For example, an employer need not have policies against theft or violence for employees to be on notice not to steal or to assault co-workers. But this is not such a situation. The Claimant had been rendering service from out of the office for many months and the Employer had permitted it. The Employer repeatedly testified that perhaps the Claimant had been out of state since July and that the Employer could not say otherwise. But this claim is

inconsistent with the idea that the Claimant was required to be in the office on a weekly basis. Based on our weighing of the evidence there was no written contract, verbal contract, or even

informal understanding shown in this record that the Claimant could not do the job while living in another state. Under the circumstances where the Employer knew for months that the Claimant had been traveling out of state regularly, and had been doing her job without coming into the office, the permanent move was not so obviously forbidden as to constitute a willful and wanton disregard of the employer's substantial interests.

As far as the previous problems cited by the Employer has not established that there was a current act of misconduct relating to these events. Clearly the current act that triggered the discharge was the move, and we find this was not a willful and wanton disregard of the Employer's interests. The Employer failed to establish a final act of poor performance that was causally related to the decision to discharge. Since the final - only current - act which caused the discharge was not proven to be misconduct, we find the Claimant is not disqualified for benefits.

The long standing law is that "[m]isconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.* 616 N.W.2d 661, 665 (Iowa 2000); *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct.App.1995); *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *Breithaupt v. Employment Appeal Bd.,* 453 N.W.2d 532, 535 (Iowa Ct.App.1990); *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219, 222 (Iowa App. 1983). This case falls within that rule. We understand why the Claimant was discharged but do not find that the Employer has proven this reason sufficient to disqualify the Claimant.

DECISION:

The administrative law judge's decision dated April 14, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

_____

Ashley R. Koopmans

_____

James M. Strohman

RRA/fnv