

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HAVYARIMANA WILSON
Claimant

G & K SERVICES COMPANY
Employer

APPEAL 16A-UI-09292-H2
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/10/16
Claimant: Appellant (2)

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.2(1)g – Retroactive Benefits

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 11, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in person hearing was held on September 13, 2016 in Des Moines, Iowa. Claimant participated with the assistance of Kirundi interpreter Benjamin Munanira. Employer did not participate. Department Exhibit D-1 was entered and received into the record.

On September 12 the employer asked for a continuance of the hearing because their witness with first-hand knowledge of the events was scheduled to be in a meeting. The employer had been mailed the hearing notice on August 29, 2016. Their request for continuance was not made three days prior to the start time of the hearing, nor did they allege any emergency. The employer's request to continue the hearing was denied.

At hearing the claimant waived notice of the issue whether he is entitled to retroactive benefits for the four-week period ending September 10, 2016. No employer is ever included on the issue of retroactive benefits and no fact-finding is usually held by the agency, thus, there was no denial of due process to the employer by adding the issue as one to be resolved during the hearing held September 13, 2016.

ISSUE:

Did the claimant file a timely appeal?

Did the claimant voluntarily quit his employment without good cause attributable to the employer or was he discharged due to job connected misconduct?

Is the claimant eligible for retroactive benefits for the four week period ending September 10, 2016?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a laundry worker beginning on February 5, 2013 through July 26, 2016 when he was discharged. The claimant and all his co-workers used their cell phones to keep track of when washing machines were started, when they were due to stop, how many pounds of clothing were in each washer and other information that they were required to document. The employer knew that all employees, including the claimant used their personal cell phones to help keep track of information during the work day. The employees would later document that information into the employer's forms.

On July 26 the claimant was entering information into his cell phone about a load he had just put into a washing machine when his supervisor Marcian came out of the bathroom. Marcian mistakenly believed that the claimant was using his cell phone for personal reasons such as texting or making a phone call. Marcian pushed the claimant told him to stop using his cell phone. Before the claimant could even explain that he was using his cell phone for work purposes, Marcian called the manager Brian to complain about the claimant's behavior. Marcian then spoke to the claimant and the claimant showed him his phone and that he had been entering work data on the phone. Marcian apologized but the claimant was still required to go and speak with the manager Brian in his office. When the claimant arrived in Brian's office he was not given an opportunity to explain what happened before Brian told the claimant to turn in his identification badge and leave the building. Brian told the claimant he would call him next week. The claimant waited one week and when he did not hear from Brian he sent him a text asking about his job. Brian told him he was not going to be allowed to come back to work and that his employment was ended. The claimant was discharged, he did not voluntarily quit his employment. Prior to his discharge the claimant had not been given any prior warnings about any behavior and had no idea that his job was in jeopardy.

The claimant does not speak English well. His ability to read English is very limited. He is not able to read the agency prepared handbook for employees as it is written in English. The claimant did not receive the decision (reference 01) denying him benefits. His benefits were stopped so he went to his local office on August 26 to inquire as to why he was no longer receiving unemployment insurance benefits. He was told on that day about the decision denying him benefits. He filed his appeal that same day. While visiting with the local office workers the claimant was not told that he had to continue filing his claim for benefits while he waited for an appeal hearing to be held. Since the claimant cannot read in English, the only way he would have known that he needed to continue to file his weekly continuing claim was if he was told to do so by the local office. Since he did not know he needed to continue filing the claimant stopped making his week claim for benefits. The claimant has continued to make the required job searches each week since he stopped claiming benefits.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 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, subsection 10, 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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

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

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

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 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The claimant was not doing anything wrong by using his cell phone to keep track of work data. His supervisor apologized and made a mistake, yet the employer still chose to discharge. As the employer has not met their burden to prove job connected misconduct, benefits are allowed, provided the claimant is otherwise eligible.

For the reasons that follow, the administrative law judge concludes the claimant's request for retroactive benefits is granted.

Iowa Admin. Code r. 871-24.2(1)g provides:

Procedures for workers desiring to file a claim for benefits for unemployment insurance.

(1) Section 96.6 of the employment security law of Iowa states that claims for benefits shall be made in accordance with such rules as the department prescribes. The department of workforce development accordingly prescribes:

g. No continued claim for benefits shall be allowed until the individual claiming benefits has completed a voice response continued claim or claimed benefits as otherwise directed by the department. The weekly voice response continued claim shall be transmitted not earlier than noon of the Saturday of the weekly reporting period and, unless reasonable cause can be shown for the delay, not later than close of business on the Friday following the weekly reporting period.

Claimant's limited English speaking ability and almost non-existent ability to read in English provide good cause for failure to follow instructions in the handbook for employees. Coupled with the fact that he met with an agency employee on August 26 and was not told to continue filing his weekly claim for benefits is considered good cause reasons for having failed to file weekly claims. Retroactive benefits are granted. Claimant shall be paid full unemployment insurance benefits for the four week period ending September 10, 2016.

DECISION:

The August 11, 2016, (reference 01) decision is reversed. The claimant filed a timely appeal. Claimant was discharged from employment for no disqualifying reason. Retroactive benefits are allowed for the four-week period ending September 10, 2016. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs