

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN K URQUIDEZ

Claimant

APPEAL NO. 08A-UI-07987-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NEIL WHITESELL ET AL
WHITESELL CORPORATION**
Employer

**OC: 01/15/06 R: 03
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 26, 2006, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on September 23, 2008. Claimant participated. Employer participated through Betsy Milam. Department's Exhibit D-1 was received.

ISSUE:

The issue is whether claimant's appeal was timely and if he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant lived at the fact-finding decision address 703 – 12th Street, Wellman, Iowa, through May 2006. He moved to 2551 Holiday Ct Apt. G7, Coralville, Iowa, on June 30, 2006, but did not notify Iowa Workforce Development (IWD) of this address change but believed the agency was aware of the new address because he obtained a job at an IWD job fair and ceased claiming benefits and did enter forwarding orders. He lived there through February 2007, when he transferred his mail service to his parents' home at 5485 Winnebago Avenue, Marion, Iowa, through June 2008, while he was in the service. The mailing address remained the same while he was living with his girlfriend in Hiawatha, Iowa, until he moved to his current address at 3131 Samuel Court #12, Cedar Rapids, Iowa, in mid-September 2008. He did not receive the fact-finding decisions but did receive the overpayment statement and went to the local office immediately to file his appeal on September 5, 2008.

Claimant was employed as a full time set up worker from March 6, 2006 until April 5, 2006, when he was discharged. Although he was accused of playing internet games on the company computer, he only used the computer during training for his job. He was not advised this was the reason for the separation and was not confronted or interviewed about the allegation but

was told he was separated because of a probationary period issue and not learning the job fast enough.

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 decisions because they were 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). The claimant timely appealed the overpayment statement of September 2008, which was the first notice of disqualification and overpayment in spite of reasonable notifications of changes of address. Therefore, the appeal shall be accepted as timely.

The remaining issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits. The administrative law judge concludes that he was not.

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.

871 IAC 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.

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. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, the claimant did not use the company computer for personal reasons and the separation was related to the speed at which he was learning his job, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company

policy, procedure, or prior warning. 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. Benefits are allowed.

DECISION:

The July 26, 2006, reference 01, decision is reversed. The claimant's appeal is timely. He was not discharged for reasons related to job misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw