IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

TINY L NORTHWAY Claimant **VERMEER MANUFACTURING COMPANY INC** Employer	**APPEAL NO. 20A-UI-14965-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/24/20** **Claimant: Appellant (5)**

Iowa Code Section 95.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On November 16, 2020, the claimant filed exhibits in connection from a decision denying Pandemic Unemployment Assistance (PUA) benefits. The Appeals Bureau erroneously treated the exhibits as a late appeal from the August 10, 2020, reference 01, decision that disqualified the claimant for regular benefits and docketed a November 16, 2020 appeal from the reference 01 decision. The reference 01 decision had disqualified the claimant for benefits and relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant voluntarily quit on November 20, 2019 without good cause attributable to the employer. After due notice was issued, a hearing was held on January 25, 2021. The claimant participated. Amanda Carnahan represented the employer. Exhibits 1, 2 and A were received into evidence. The administrative law judge took official notice of the August 10, 2020, reference 01, decision and of the administrative law judge decision in Appeal Number 20A-UI-00490-JTT.

ISSUES:

Whether the claimant filed a timely appeal from the August 10, 2020, reference 01, disqualification decision.
Whether the claimant voluntarily quit without good cause attributable to the employer.
Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On August 10, 2020, Iowa Workforce Development Benefits Bureau mailed the August 10, 2020, reference 01, decision to the claimant's Beacon, Iowa last-known address of record. The decision disqualified the claimant for unemployment insurance benefits and stated the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant voluntarily quit on November 20, 2019 without good cause attributable to the employer. The decision stated that the decision would become final unless an appeal was postmarked by August 20, 2020 or received by the Appeal Section by that date. The decision

provided clear and concise instructions for filing an appeal from the decision. The claimant received the decision in a timely manner, prior to the deadline for appeal. The claimant did not file an appeal from the reference 01 decision by the August 20, 2020 appeal deadline.

The claimant asserts that she spoke to an Iowa Workforce Development representative and that the IWD representative told her not to file an appeal from the reference 01 decision and to instead file an application for PUA benefits. On August 18, 2020, the claimant filed an application for Pandemic Unemployment Assistance (PUA) benefits. On September 23, 2020, an IWD representative entered an Assessment for PUA Benefits decision that denied PUA benefits. On November 12, 2020, the claimant participated in an appeal hearing pertaining to PUA benefits with the undersigned administrative law judge. The administrative law judge left the PUA appeal hearing record open until November 16, 2020 for the limited purpose of allowing the claimant to submit pay stubs and documentation pertaining to alleged COVID-19 testing. On November 16, 2020 the claimant submitted unlabeled materials to the Appeals Bureau. The Appeals Bureau erroneously treated the materials as a late appeal from the August 10, 2020, reference 01, decision that disqualified the claimant for unemployment insurance benefits, based on the deputy's conclusion that the claimant voluntarily quit on November 20, 2019 without good cause attributable to the employer.

The claimant was employed by Vermeer Manufacturing Company, Inc. as a full-time material handler from August 2019 until November 20, 2019. On November 20, 2019, the claimant went to her supervisor's office with concern about her hand. The supervisor discerned that the claimant rambled, appeared overly talkative, appeared hyperactive, and appeared nervous. The claimant's speech patter was such that the supervisor could not understand all of what the claimant was saying. The supervisor suspected the claimant was under the influence of a controlled substance. A second supervisor also observed the claimant's demeanor and drew the same conclusion. Both supervisors had participated in a two-hour training and one-hour annual follow-up training regarding discerning whether an individual was under the influence of drugs or alcohol and pertaining to drug testing. The supervisors requested that the claimant submit to reasonable suspicion drug testing and prepared to transport the claimant to a collection site for drug testing. The claimant told the employer she taken a pain pill that would show up in a drug screen. The claimant had in fact taken hydrocodone that was not prescribed to her. The claimant declined to participate in the drug testing. The supervisor reminded the claimant that refusal to submit to drug testing would lead to discharge from the employment. The claimant elected to sign a resignation prepared by the supervisor in lieu of submitting to drug testing. The employer had a written drug testing policy that included reasonable suspicion drug testing. The employer had provide a copy of the policy to the claimant at the time of hire. The policy provided uniform enforcement by stating that a positive drug test and a refusal to submit to drug testing would each lead to discharge from the employment.

REASONING AND CONCLUSIONS OF LAW:

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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed 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 was 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. See Iowa Administrative Code rule 871-24.35(1)(a). See also *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See Iowa Administrative Code rule 871-24.35(1)(b).

The evidence in the record establishes 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. IDJS*, 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. IDJS*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). One 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. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973).

The claimant's assertion that an IWD representative advised her to forego filing an appeal from the August 10, 2020, reference 01, disqualification decision and to instead file an application for PUA benefits is problematic. The claimant cannot name the IWD representative with whom she allegedly spoke. However, it is not out of the realm of possibility that an IWD representative

could have, in the context of the COVID-19 pandemic and an unprecedented volume of claims, advised the claimant to forego appealing a disqualification for regular benefits and instead pursue an application for PUA benefits. The administrative law judge is aware of other instances in which the Agency initiated such discussions. With that in mind, and given the PUA application filed during the period in which an appeal from the August 10, 2020 disqualification decision would have been timely, the administrative finds good cause to treat the claimant's late appeal from the August 10, 2020, reference 01, as a timely appeal. The administrative law judge concludes that he has jurisdiction to enter a ruling on the merits.

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *See Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

Iowa Administrative Code Rule 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

The weight of the evidence establishes that the claimant quit in lieu of being immediately discharged from the employment based on her refusal to submit to reasonable suspicion drug testing.

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board,* 616 N.W.2d 661 (Iowa 2000). 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

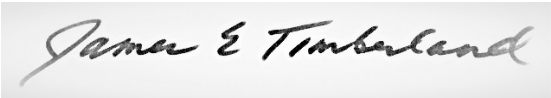
Iowa Code Section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In *Eaton v Employment Appeal Board*, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence establishes a discharge or misconduct in connection with the employment. The employer's drug testing policy complied with the statutory requirements. The supervisors who requested the drug test had undergone the requisite training. The supervisors reasonably concluded that claimant was under the influence of a controlled substance. The claimant added

to the reasonable suspicion by making the unsolicited comment that she had taken a prescription narcotic. The employer's policy provided for uniform discipline of discharge from the employment for refusal to submit to drug testing. The claimant's refusal to submit to drug testing constituted misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The August 10, 2020, reference 01, decision is modified as follows. The claimant quit on November 20, 2019 in lieu of being immediately discharged for misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.



James E. Timberland
Administrative Law Judge

February 16, 2021
Decision Dated and Mailed

jet/scn

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

- If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to https://www.iowaworkforcedevelopment.gov/pua-information. **If you do not apply for and are not approved for PUA for the affected period, you will be required to repay the benefits you have received.**