IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN J WEISENSTEIN
Claimant

BITUMA CORP
Employer

APPEAL NO. 11A-UI-14096-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/11/11
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

John Weisenstein filed an appeal from the October 6 2011, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held in Decorah on February 28, 2012. Mr. Weisenstein participated and presented additional testimony through Cindy Weisenstein. Marilyn Hackett represented the employer and presented additional testimony through Terri Wall. Department Exhibit D-1, and Exhibits One through Four, A and B were received into evidence.

ISSUES:

Whether Mr. Weisenstein's appeal was timely.

Whether Mr. Weisenstein was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On October 6, 2011, Iowa Workforce Development mailed a copy of the October 6, 2011, reference 01, decision to John Weisenstein's last-known address of record. The decision carried on its face an October 16, 2011 deadline for appeal. That date was a Sunday, so the deadline would have been extended by operation of law to Monday, October 17, 2011. Mr. Weisenstein received the decision on October 17, 2011. Upon receiving the decision, Mr. Weisenstein immediate contacted the closest Workforce Development to advise that he had received a decision after the appeal deadline date set forth on the decision. Mr. Weisenstein was advised to go ahead and file an appeal. On October 25, 2011, Mr. Weisenstein completed an appeal form. On October 26, the Appeals Section received the completed appeal form by fax.

Mr. Weisenstein was employed by Bituma Corporation as a full-time welder from 1992 until September 7, 2011, when Kevin Kinley, Manager of Manufacturing discharged him from the employment. On the surface, the discharge was based on attendance. However, in making the

decision to discharge Mr. Weisenstein from the employment, the employer considered his refusal to see further evaluation or treatment for a large area of basal cell skin cancer on the side of his face.

The employer has a collective bargaining agreement that allows for ten days (80 hours) of unscheduled vacation to be used per calendar year as "call-in or same shift vacation." Any absences beyond those ten that are not pre-approved absences subject the employee to disciplinary action. Mr. Weisenstein used the last of his 2011 allowance of unscheduled vacation on September 7, 2011. Mr. Weisenstein signed and received a document on that date that notified him he had exhausted his call-in vacation. That same day, the employer discharged him from the employment.

On September 2, Mr. Kinley, spoke to Mr. Weisenstein and provided him with a written memo regarding his persistent facial wound. The memo indicates as follows:

> John, as we discussed this afternoon, the company is required to protect you and your co-workers from blood-borne pathogens. We are concerned about your persistent facial wound. As I said, we are offering you the following options:
>
> 1. That you see your own doctor for a diagnosis to insure that there is no risk of contamination to yourself or other employees and what is a reasonable means of securing the wound to prevent exposure to other employees and protect yourself while you are working.
> 2. If you prefer, we can make arrangements for you to see a company doctor to obtain the same diagnosis and recommendations for protecting both yourself and your co-workers.
>
> Please get back to Marilyn Hackett on Tuesday with your decision.

Mr. Weisenstein was unwilling to pursue either option. Mr. Weisenstein lacked health insurance. Mr. Weisenstein had been diagnosed with basal cell skin cancer in 2007 after the employer insisted that he seek medical evaluation. The employer had paid for an office visit, but Mr. Weisenstein had ended up shouldering the additional $900.00 in fees associated with the diagnosis. Mr. Weisenstein has received no further evaluation or treatment since. Mr. Weisenstein knew the condition was not contagious and had provided appropriate documentation to the employer back in 2007. Mr. Weisenstein did not trust the employer not to saddle him again with additional medical bills he could not afford.

On September 7, 2011, the employer met with Mr. Weisenstein to get his answer regarding whether he would or would not seek further evaluation for his facial wound. When Mr. Weisenstein indicated he would not, the employer told him he was being discharged for attendance.

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, 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 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 871 AC 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 871 IAC 24.35(1)(b).

The appeal at issue in this case was filed on October 26, 2011, the date the Appeals Section received the appeal. The was exactly ten days after the stated deadline for appeal, but only nine days after Mr. Weisenstein received the decision.

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date of the decision 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). 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. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973).

The record establishes that Mr. Weisenstein was denied a reasonable opportunity to file an appeal in a timely appeal on or before the stated appeal deadline date because he only just received the decision on October 17, 2011. The appeal was filed with ten days of Mr. Weisenstein's late receipt of the decision. There is good cause, based on delay or other error on the part of the United States Postal Service, to treat the late appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge has jurisdiction to rule on the merits of the appeal.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 a discharge 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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

Given the provision of the collective bargaining agreement under which Mr. Weisenstein was allowed ten days (80 hours) of unscheduled vacation per calendar year, and given the employer's notice to Mr. Weisenstein just on September 7, 2011 that he had exhausted the call-in vacation, the record fails to establish an unexcused absences upon which a disqualification for benefits might be based. Regardless, the weight of the evidence indicates that attendance issue was a pretext and that it was Mr. Weisenstein's refusal to seek further medical evaluation for the wound on his face that triggered the discharge.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer's request in September 2011 that Mr. Weisenstein seek further evaluation for a open wound that has been on his face at least since 2007 was reasonable. Having observed the wound during the hearing, the administrative law judge has no difficulty understanding the employer's concern for workplace safety and for Mr. Weisenstein's wellbeing. Sadly, Mr. Weisenstein's inability to pay for medical services made his refusal to seek further medical services reasonable under the circumstances. The employer's memo was silent on who would bear the cost of medical evaluation, whether that evaluation was conducted by a doctor of Mr. Weisenstein's choosing or of the employer's choosing. The discharge based on

Mr. Weisenstein's refusal to see further medical evaluation for a previously diagnosed non-contagious basal cell skin cancer would not disqualify Mr. Weisenstein for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Weisenstein was discharged for no disqualifying reason. Accordingly, Mr. Weisenstein is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Weisenstein.

DECISION:

The Agency representative's October 6, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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