IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEAN A VANDERKAMP
Claimant

PELLA REGIONAL HEALTH CENTER
Employer

APPEAL NO: 15A-UI-07508-LDT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/31/15
Claimant: Appellant (1)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Jean A. VanDerKamp (employer) appealed a representative's June 18, 2015 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Pella Regional Health Center (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 11, 2015. The claimant participated in the hearing. Ashley Arkema appeared on the employer's behalf. One other witness, Mary Jo Foster, was available on behalf of the employer but did not testify. During the hearing, Exhibit A-1 and Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits denied.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on June 18, 2015. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 28, 2015, a Sunday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, June 29, 2015. The claimant received the decision, but the United States Postal Service did not deliver it to her until June 30, 2015. The appeal was not filed until June 30.

The claimant started working for the employer on June 21, 2004. She worked full time as a home care aide. Her last day of work was May 14, 2015. The employer discharged her on that date. The stated reason for the discharge was a conclusion that she had falsified her time card and that she had worked outside the scope of her allowed duties after a prior warning.

The claimant went to a client's home on May 7. The employer, through second-hand testimony, asserted that the claimant arrived at 10:15 a.m. (rather than 10:10 as scheduled) but that she documented arriving at 10:25 a.m., that she had then left at 10:30 a.m. and was not back at least by 11:05 a.m., although she recorded an end time of 11:25 a.m. The cares the claimant documented as provided to the client included a shower. Upon further inquiry, the claimant indicated it was not a shower, but a sponge bath, and that she had left the home briefly to run some errands for the client while the client did some of the bath privately. The claimant's first-hand testimony was that she had arrived right at about 10:25 a.m. and had done the sponge bath, and that she had left to run the errand (getting milk) from about 10:45 a.m. to about 11:00 a.m., and that she had then returned for the remainder of the time until 11:25 a.m. The administrative law judge finds the claimant's first-hand testimony as to the accuracy of the time card to be more credible.

The employer had previously allowed its employees to provide homemaker services for clients such as running errands, but it had made a specific break with that practice. On June 5, 2014 the employer had given the claimant a final written warning for a similar concern on a time card, but further with regard to doing "homemaker services which [the employer] does not participate in." It stated in the performance improvement plan that she "will not do homemaker services," and in the "outcomes and consequences" that she must "stop homemaker services [at] once." In that instance the "homemaker service" had been to take the client to a doctor's appointment, arguable closer to being a medically related service than going to get milk. The claimant asserted that some of the employer's own nurses had, within the last year, been at the home at the same time as the claimant and had sent her out specifically to get milk for the client while the nurse handled other cares, but on this occasion there had not been a nurse that had directed the claimant to run the errand of getting the milk.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa 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 shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to rule 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's performance of a homemaker service after specifically being warned that she must not do so in a final written warning, indicating that her job was in jeopardy, shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The appeal is treated as being timely. The representative's June 18, 2015 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 14, 2015. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs