IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

ROBERT F DELANEY
Claimant

JELD-WEN INC
Employer

APPEAL NO. 18A-UI-09818-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/26/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Robert Delaney (claimant) appealed a representative's September 13, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because of his separation from employment with Jeld-Wen (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 9, 2018. The claimant participated personally. The employer was represented by Andrew Rink, Associate General Counsel, and participated by Mark Saw, Human Resources Manager. The employer offered and Exhibit 1 was received into evidence. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 13, 2014, as a full-time quality technician. On May 14, 2014, the claimant signed for receipt of the employer's handbook. On May 14, 2014, the claimant signed that he reviewed and understood the content of the employer's Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Procedure. The policy states in part that sexual harassment is unwelcome verbal conduct directed toward an individual because of a person's gender that interferes with a person's work or creates an intimidating or offensive work environment. The employer has a no-tolerance policy with regard to harassment.

Until July 2018, the claimant walked around the plant performing quality checks. He regularly told his female work partner that she looked nice. The claimant thought this was acceptable because they were friends.

In approximately April 2018, the claimant's manager had a talk with the claimant after he commented on a female co-worker's appearance. The claimant referred to the adult female co-

worker as a “girl”. The female co-worker was the manager’s ex-girlfriend. The manager said, “Don’t do that no more. Stay away from her. She’s a bitch. Don’t talk to her again.”

On August 27, 2018, a female co-worker complained to the employer that the claimant rubbed her back and made comments about her appearance being attractive on or about August 12, 2018. The claimant’s actions and comments made her feel uncomfortable. She reported four other women who the employer might question.

The employer questioned four other female employees separately on August 27, 2018. Each woman was separately asked, “Does anyone make you feel uncomfortable”. Each employee independently indicated the claimant. They each stated they did not want to be around him and left the work area to avoid him. One of the women told the employer she reported his actions to the manager. The claimant stopped after this. One of the women told the claimant to stop and he did. All four women said the claimant made various comments about their appearance or attractiveness.

The employer interviewed the claimant on August 27, 2018. The claimant remembered the discussion with his manager regarding his comment to a co-worker. The employer placed the claimant on suspension. On August 29, 2018, the employer terminated the claimant for violating their sexual harassment policy.

A disqualification decision was not mailed to the claimant’s last known address of record on September 13, 2018, and, therefore, he did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by September 24, 2018. The claimant learned of the existence of the decision on September 25, 2018. The appeal was filed on September 26, 2018, which is after the date noticed on the disqualification decision.

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 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 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). The claimant sent an appeal as soon as it learned. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes he was.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to follow instructions in the performance of the job. The claimant disregarded the employer's right by repeatedly failing to follow the employer's instructions. The manager told him to stop and stay away. The claimant did so with one co-worker but admitted to continuing his behavior with another co-worker.

The claimant argues that his behavior is not misconduct because he did not intend for his co-workers to feel offended. The claimant was placed on alert by his manager when one female co-worker was offended by his remarks. By knowingly engaging in the conduct again, his behavior became intentional. The claimant has admitted to knowingly engaging in this type of conduct at work after a manager's warning. The claimant's disregard of the employer's interests is misconduct. As such the claimant is not eligible to receive unemployment insurance benefits.

DECISION:

The September 13, 2018, reference 01, decision is affirmed. The appeal in this case is considered timely. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs