IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TRISHA D DUNKELBERGER
Claimant

THE BAKING COMPANY
OF BURLINGTON LLC
Employer

APPEAL NO. 08A-UI-02562-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/08 R: 02
Claimant: Respondent (5)

Section 96.5(2)a – Discharge
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

The employer, The Baking Company, filed an appeal from a decision dated March 11, 2008, reference 02. The decision found the employer's protest was not timely. After due notice was issued a hearing was held by telephone conference call on March 31, 2008. The claimant participated on her own behalf and was represented by Stuart Cochrane. The employer participated by Director of Human Resources Maryann Wentworth. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the protest is timely and whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Claimant's notice of claim was mailed to employer's address of record on February 18, 2008, and received by employer within ten days. The notice of claim contains a warning that any protest must be postmarked, faxed or returned not later than ten days from the initial mailing date. Employer did not file a protest until March 5, 2008, which is after the ten-day period had expired. Director of Human Resources Maryann Wentworth received the notice of claim on February 22, 2008, and contacted the Iowa Workforce Development office in Des Moines, Iowa, to discuss severance pay. An offer of severance pay had been made to the claimant and she had until March 6, 2008, to return or reject the offer. Ms. Wentworth asked the Workforce representative if she could delay returning the notice of claim until she knew whether the claimant was going to accept the severance offer. Unfortunately she did not notify the representative that the due date of the notice of claim was February 28, 2008, and so the representative told her there would be no problem waiting until March. Ms. Wentworth submitted the protest on March 5, 2008.

Trisha Dunkelberger was employed by The Baking Company from February 28, 2007 until February 14, 2008, as the chief financial officer. In November and December 2007, Capstone,

a lender, indicated to the employer's board of directors it had "lost confidence" in the claimant's ability to handle financial matters and records. The board decided on a "restructuring" of the Boone, Iowa, location. On February 14, 2008, the claimant was notified she was going to be removed as CFO and would become the controller, with the same rate of pay. Later that day all employees at the Boone location, who had not previously been drug tested, were informed they would be drug tested. Ms. Dunkelberger initially stated she would not take the test because it violated her civil rights, but later did submit to the test.

Upon hearing of the claimant's initial refusal to take the test board member Richard Loefgren stated he felt that was "enough" and instructed Ms. Wentworth to discharge the claimant, which she and Director of Operations Michael Yarmalloff did in person.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

> 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 administrative law judge concludes that employer submitted the protest late based on information given to her by a representative of Iowa Workforce Development. Although the employer did not notify the representative the due date of the protest was February 28, 2008, the representative did tell her it was "okay" to wait until March 6, 2008. Based on this the administrative law judge considers the employer's protest should be accepted as timely.

Iowa Code section 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 to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). In the present case the final, precipitating incident which cause the discharge was the claimant's initial refusal to take the drug test. Apparently she misunderstood the provisions of Iowa law which allow for drug testing of all employees at a certain location without the need for random selection as is required for individual tests.

Nonetheless, Ms. Dunkelberger did submit to the test when the time came. The employer was not going to discharge her prior to that but had only changed her job duties to comply with the request from Capstone. There was no final act of misconduct as the claimant did take the drug test as required. Without a final, precipitating incident of misconduct as required by 871 IAC 24.32(6), disqualification may not be imposed.

DECISION:

The representative's decision dated March 11, 2008, reference 02, is modified without effect. The employer's protest shall be accepted as timely but the claimant is still qualified for benefits as she was discharged but not for misconduct. She is qualified for benefits, provided she is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs