

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

CANDACE E BUSHAN  
2375 LEGACY RD  
DECORAH IA 52101

CANTON PUB  
PO BOX 153  
CANTON MN 55922

Appeal Number: 05A-UI-03284-DT  
OC: 08/29/04 R: 04  
Claimant: Appellant (2/R)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge  
Section 96.6-2 – Timeliness of Appeal  
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Candace E. Bushan (claimant) appealed a representative's March 18, 2005 decision (reference 04) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Canton Pub (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 15, 2005. The claimant participated in the hearing. Gloria Potter appeared on the employer's behalf. During the hearing, Exhibit A-1 was 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? Was the claimant discharged for work-connected misconduct?

#### FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on March 18, 2005. The claimant received the decision within a few days thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 28, 2005. On March 28, 2005, the claimant took her appeal to the local Agency office and gave it to a workforce advisor. Because of internal workload issues in the local Agency office, the workforce advisor did not fax the appeal as requested to the Appeals Section until March 29, 2005, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on October 21, 2004. She worked part-time (approximately 28 hours per week) as a cook in the employer's bar and supper club. Her last day of work was February 17, 2005. The employer discharged her on February 18, 2005. The reason asserted for the discharge was unreliability of attendance.

The claimant originally had been hired to work shifts including weeknights and Saturday days. By November 11, 2004, she had indicated that she could no longer work weeknights other than Thursday and Friday and could not work Saturday days due to difficulty in finding a babysitter. Ms. Potter, the owner, accommodated the change to the claimant's schedule. There were several times when the claimant was still absent due to no babysitter.

The claimant was scheduled to work on Friday evening, February 18, 2005. She called Ms. Potter at approximately noon and advised her that she probably could not work as she did not have a sitter, and generally indicated that it was too hard to find a sitter on Fridays and Saturdays so she might have to reduce her days further. Ms. Potter responded that she would make some calls; the claimant believed she meant to try to find a sitter for the claimant, as Ms. Potter's grandson had babysat for the claimant before. However, Ms. Potter was seeing if another employee could cover the claimant's hours. Later that evening, Ms. Potter spoke to the claimant and informed her that she was discharged as she could not work the hours needed and was missing too many shifts due to the babysitter issues. No prior warning had been given to the claimant to indicate that her job was in jeopardy due to the attendance issues.

The claimant established an unemployment insurance benefit year effective August 29, 2004. She filed an additional claim effective February 20, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision.

Iowa Code section 96.6-2 provides in pertinent part:

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. . . . 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.

The ten calendar days for appeal begin 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 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 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 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 section 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979), and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

The substantive issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 section 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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination. Higgins, supra. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. First, as a Minnesota employer, the chargeability laws of Iowa will have little bearing. Even if the employer was an

Iowa employer, however, the employer's account is only chargeable if the employer is a base period employer. Iowa Code section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code section 96.19-3. The claimant's base period began April 1, 2003 and ended March 31, 2004. The employer did not employ the claimant during this time, and therefore, the employer is not currently a base period employer and its account would not be currently chargeable for benefits paid to the claimant.

An issue as to whether the claimant is sufficiently able and available for work due to the babysitter issues arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's March 18, 2005 decision (reference 04) is reversed. The claimant's appeal was timely. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

ld/sc