

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL C GINGERICH
Claimant

APPEAL NO. 09A-UI-18742-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARC RHODES
Employer

OC: 10/04/09
Claimant: Respondent (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 27, 2009 (reference 01) decision that found the claimant available for work and allowed benefits. After the IWD Tax Section found claimant to be an employee and due notice was issued, a telephone conference hearing was held on August 6, 2010. Claimant participated and was represented by Erik Fern, Attorney at Law. Employer participated through current Holiday Shores Motel Manager Terry Stufflebeam and Owner Marc Rhodes. Department's Exhibit D-1 was admitted to the record. Claimant's Exhibit A was admitted to the record.

ISSUES:

The issues are whether employer's protest and appeal were timely, if claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits, and if claimant was able to and available for work effective October 4, 2009.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Rhodes did not receive timely notice of the claim for benefits, since claimant had control of the business post office box and did not share the IWD correspondence with him. The claimant believed he and Rhodes had an agreement that there would be no protest of unemployment if he put in 20 hours per week at the business. The claim was filed the week of October 23, 2009 and backdated to October 4, 2009. Claimant did not forward the 201A dated October 26, 2009 because of his interpretation of the agreement. Employer protested/appealed on November 24, 2009.

Claimant and Rhodes were business partners with claimant as the managing partner in Holiday Shores Motel until February 2009, when Rhodes became majority owner after the business was threatened with foreclosure. Claimant remains a minority partner. Rhodes removed claimant as business managing partner and assigned him to run the day to day operations. A few weeks later, he was directed to act as renovation manager after it was determined that new condo

construction would not proceed as originally planned. Rhodes decided about 90 days prior to the separation on October 23, 2009 that claimant would eventually be removed from his role as manager because of disputes between the two about alleged mismanagement of the property. Rhodes hired Stufflebeam in September 2009 to begin working in early October 2009, so Stufflebeam and claimant worked together for about three weeks before claimant was discharged.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether employer's protest is timely. The administrative law judge concludes it is.

Iowa Code § 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 employer did not have an opportunity to protest the notice of claim, because the notice was not received. Without timely 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 employer filed the protest upon notice of the claim. Therefore, the protest shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

871 IAC 24.32(8) provides: Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past act or acts. The termination of employment must be based upon a current act. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

Inasmuch as employer had decided about three months prior to the separation to fire claimant as an employee of the partnership and kept him employed long enough to hire and train someone to replace him, it has not met the burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The October 27, 2009 (reference 01) decision is affirmed. Employer's protest was timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw