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

JOHN C DRISCOLL
1489 W 3RD ST
DUBUQUE IA 52001

EAGLE WINDOW & DOOR INC
ATTN AMY TURNER
PO BOX 1072
DUBUQUE IA 52004-1072

Appeal Number: 06A-UI-00093-RT
OC: 11-27-05 R: 04
Claimant: Respondent (2)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Initial Determination (Timeliness of Appeal)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Eagle Window & Door, Inc., filed an appeal from an unemployment insurance decision dated December 23, 2005, reference 01, allowing unemployment insurance benefits to the claimant, John C. Driscoll. After due notice was issued, a telephone hearing was held on January 19, 2006, with the claimant participating. Jeff Carson, Director of Human Resources, participated in the hearing for the employer. Department Exhibit One and Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One and Employer's Exhibits One through Three, the administrative law judge finds: An unemployment insurance decision dated December 23, 2005, reference 01, determined that the claimant was eligible to receive unemployment insurance benefits because records indicate he was dismissed from work on December 1, 2005 but his dismissal was not for a current act of misconduct. That decision was sent to the parties on December 23, 2005. That decision indicated that an appeal had to postmarked or otherwise received by the Appeal's Section by January 3, 2006 (the decision actually said January 2, 2006 but because that was a holiday the appeal would be due the next business or working day). However, as shown at Department Exhibit One, the employer's appeal was faxed to the Appeal's Section and received by the Appeal's Section on January 4, 2006, one day late. The employer had attempted to fax its appeal to Workforce Development at 6:12 p.m. on January 3, 2006 and again at 6:49 p.m. on January 3, 2006 but received no response from the Appeal's Section fax machine. These attempted appeals are shown at Department Exhibit One. Although the times on the two fax call reports show 7:12 p.m. and 7:49 p.m. the employer's witness, Jeff Carson, Director of Human Resources, testified that the fax machine was one hour off and that the faxes were actually made at 6:12 p.m. and 6:49 p.m. The number of the fax machine shown on the fax call reports is the correct number for the Appeal's Section.

Because the administrative law judge hereinafter concludes that the employer's appeal was late but that the employer has demonstrated good cause for the delay in filing its appeal, the administrative law judge further finds: The claimant was employed by the employer as a full time machine operator from June 30, 2000 until he was discharged on December 1, 2005. The claimant was discharged for making inappropriate comments of a sexual nature to a female co-worker which is prohibited by the employer's policies. In its work rules as shown at Employer's Exhibit Two, harassment of any employee on the job, for any reason, sex, race, color, physical attributes, age, national origin, or any other reason is strictly forbidden. A violation is deemed a serious violation which can result in immediate dismissal. These work rules are included in the handbook, a copy of which the claimant received and for which he signed an acknowledgment. The claimant was aware of these rules.

On September 12, 2005, the claimant remarked to a female co-worker, Terry Tarkett, who was bending over at the time, don't do that in front of me. Ms. Tarkett asked the claimant "do what?" The claimant said bend over in front of me. Ms. Tarkett asked why and the claimant said because it makes him horny. On September 20, 2005, the claimant slapped Ms. Tarkett on the rear end when she was bending over and then said to her I told you not to point that at me. These incidents did not come to light until Ms. Tarkett reported them in regards to an investigation of another employee for incidents related to Ms. Tarkett. Ms. Tarkett merely pointed these incidents out to the employer and then indicated that she was used to such comments as she had been a bartender. Ms. Tarkett divulged these incidents on November 10, 2005. Ms. Tarkett provided a written statement as shown at Employer's Exhibit One. The employer then began an investigation of these incidents which was completed on November 28, 2005 when the employer determined that such incidents had occurred. The claimant was then discharged on December 1, 2005.

The claimant received a final warning on June 30, 2005 as shown at Employer's Exhibit Three when he referred to an African-American intern who was doing some filming for the employer, as a "black director." The African-American intern complained about this behavior and asked for an investigation. On December 11, 2003, the claimant was given a written warning for inappropriate comments to a co-worker.

Pursuant to his claim for unemployment insurance benefits filed effective November 27, 2005, the claimant has received unemployment insurance benefits in the amount of $2,443.00 as follows: $349.00 per week for seven weeks from benefit week ending December 10, 2005 to benefit week ending January 21, 2006. For benefit week ending December 3, 2005, the claimant received no unemployment insurance benefits showing earnings in an amount sufficient to cancel benefits for that week.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal of a decision dated December 23, 2005, reference 01, or, if not, whether the employer demonstrated good cause for such failure. The administrative law judge concludes that although the employer's appeal was not timely, the employer has demonstrated good cause for its delay and therefore such appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

2. Whether the claimant's separation from employment was a disqualifying event. It was.

3. Whether the claimant is overpaid unemployment insurance benefits. He 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, subsection 10, 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 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 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).

(2) The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

871 IAC 24.35(1), (2) provide:

> (1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
>
> a. If transmitted via the United States postal service, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
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> b. If transmitted by any means other than the United States postal service on the date it is received by the division.
>
> (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service or its successor, the division shall issue an appealable decision to the interested party.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for a delay in the filing of its appeal. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that although its appeal was not timely, it had good cause for the delay in the filing of its appeal. On its face as shown at Department Exhibit One and as set out in the Findings of Fact, the employer's appeal is one day late being faxed successfully on January 4, 2006. However, the employer's witness, Jeff Carson, Director of Human Resources, credibly testified that the employer attempted to fax its appeal to the Appeal's Section on two different occasions on January 3, 2006, at 6:12 p.m. and again at 6:49 p.m. as shown by the fax call reports which are part of Department Exhibit One. Although the fax call reports show the times at 7:12 p.m. and 7:49 p.m. Mr. Carson credibly testified that the fax machine was one hour off. The administrative law judge notes that the fax number on the fax call report is the correct number. The administrative law judge further notes that the fax call reports indicate no response from the receiving fax machine which is the Appeal's Section fax machine. Based upon the record here, the administrative law judge is constrained to conclude that the delay in the filing of its appeal was due to error or misinformation on the part of Iowa Workforce Development and in particular the Appeal's Section because it appears that the fax machine for the Appeal's Section was either busy or out of paper or otherwise inoperable so as to prevent the employer's fax from going through. The administrative law judge notes that it is most common for appellants to fax their appeals to the Appeal's Section and the fax machine is supposed to operate 24 hours a day, seven days a week. Accordingly, the administrative law judge concludes that the employer's appeal of the decision dated December 23, 2005, is not timely but the employer has demonstrated good cause for its delay and, as a consequence, the employer's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

871 IAC 24.32(1)a, (8) provide:

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).

> (8) 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 on such past act or acts. The termination of employment must be based on a current act.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on December 1, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct. Mr. Carson credibly testified that the claimant was discharged for inappropriate comments to a female co-worker on September 12, 2005 and inappropriate touching of that same female co-worker on September 20, 2005. Mr. Carson credibly testified that on September 12, 2005 the claimant told a female co-worker that she should not bend over in front of him because it made him horny. Mr. Carson further credibly testified that on September 20, 2005, the claimant slapped the same female co-worker on the rear end when she was bent over and then said that he told her not to point that at him. Mr. Carson's testimony was hearsay evidence supported by a written statement by the female co-worker as shown at Employer's Exhibit One. The administrative law judge finds that this hearsay evidence is credible. The employer learned of this when it was conducting an investigation involving another worker and the female in question. The female in question merely stated what the claimant had done but said that she was used to those comments and behavior because she had been a bartender. These statements were made by the female co-worker on November 10, 2005. The circumstances by which the female co-worker made these statements enhances her credibility. Further, Mr. Carson credibly testified that once the employer learned of these matters the employer began an investigation of the claimant. Mr. Carson credibly testified that during both investigations he found nothing to indicate that the female co-worker was not truthful. Accordingly, the administrative law judge concludes that the hearsay evidence is most credible. The claimant denied any of the matters asserted in those two incidents but earlier testified that he did not remember those days. On the record here, the administrative law judge concludes that the hearsay evidence of Mr. Carson is more credible and outweighs the general denials of the claimant. Accordingly, the administrative law judge concludes that the claimant did make the comments alleged by the employer and further committed the contact or touching as alleged by the employer.

The employer has a policy in its work rules as shown at Employer's Exhibit One strictly forbidding harassment of any employee on the job for any reason. This policy is in the handbook, a copy of which the claimant received and for which he signed an acknowledgment. The claimant testified that he was aware of the policy.

The evidence also establishes that the claimant received a final warning on June 30, 2005 for making a racial comment to an African-American intern. The claimant referred to the African-American intern as a "black director" when the intern was filming some sequences for the employer. The claimant denied stating this and testified that the intern told the claimant to call him the "black man" and that the claimant said no he would simply call him "Ron Howard" (the famous film director). The administrative law judge concludes that the claimant's version is not credible. The administrative law judge does not believe that an African-American intern engaged in filming at the instructions of the employer would refer to himself as a "black man." Further, even the claimant's comment about calling him Ron Howard, is inappropriate because it seems to make fun of the intern for making film since Mr. Howard is a famous film director. The evidence also establishes that on December 11, 2003, the claimant received a written warning for inappropriate comments to a co-worker but testified he did not know what the inappropriate comments were. It is clear even from the claimant's testimony that he received the warnings and that he was aware that his behavior and in particular his comments to co-workers was of concern to the employer. The claimant should have governed himself exceedingly appropriately in view of the warnings and his admitted knowledge of the employer's policies. The claimant did not.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant did make the comments assigned to him and further committed the actions for which he is accused and that these comments and actions violated the employer's policies and coupled with the claimant's prior warnings, establish that the claimant's statements and acts were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. The fact that the female co-worker who was the subject of the claimant's statements and acts stated that she was used to them does not excuse the claimant's use of such statements and acts. See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) where the United States Supreme Court held that a victim of sexual harassment through a hostile environment does not have to suffer psychological damage or decline in job performance.

The administrative law judge also concludes that these acts of disqualifying misconduct were current acts. The evidence establishes that although the acts and comments giving rise to the claimant's discharge occurred in September of 2005, the employer did not learn about them until November 10, 2005. At that time the employer conducted an investigation which was completed on or about November 28, 2005 and the claimant was then discharged. The employer did not delay unduly once it learned of the comments and statements. Accordingly, the administrative law judge concludes that the acts and statements by the claimant giving rise to his discharge were current acts of disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant, until, or unless, he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $2,443.00 since separating from the employer herein on or about December 1, 2005 and filing for such benefits effective November 27, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of December 23, 2005, reference 01, is reversed. The claimant, John C. Driscoll, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of $2,443.00. Although the employer's appeal was not timely, the employer has demonstrated good cause for a delay in the filing of its appeal and the appeal is, therefore, accepted.

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