IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LINDA L WEIDEMAN
Claimant

MAINSTREAM LIVING INC
Employer

APPEAL NO: 13A-UI-00101-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/25/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Mainstream Living, Inc. (employer) appealed a representative's December 19, 2012 decision (reference 01) that concluded Linda L. Weideman (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 12, 2013. The claimant participated in the hearing. Marcanne Lynch appeared on the employer's behalf and presented testimony from two other witnesses, Tracy Moore and Romnita Watkins. 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 employer's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The representative's decision was mailed to the employer's official address of record on December 19, 2012. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 29, 2012. The appeal was not filed until January 3, 2013, which is after the date noticed on the disqualification decision.

On or about December 18, 2012 the employer took action to designate that some of its payroll information was no longer to go directly to the employer, but to go to a third party representative, ADP Compliance and Payment Solutions in San Dimas, California. At that same time action was taken so that the official mailing address for other mail for the employer was to

go to the employer's regular mailing address of P.O. Box 1608, Ames, IA 50010-1608, but the field for "Attention:" was filled in to show "Lynda McCalley," the person in the employer's offices who dealt with payroll and other such employment issues, but not specifically with unemployment eligibility issues. As a result of this change to the employer's official address of record, the representative's decision issued on December 19 was mailed to: Lynda McCalley, Mainstream Living Inc., P.O. Box 1608, Ames IA 50010. McCalley received the representative's decision, but as she did not realize what it was, she did not immediately open it. When she saw the employer's human resources manager, Lynch, on January 3, 2013, she gave the decision to her. Lynch then proceeded to make this appeal.

While based on Ms. Lynch's communication with this appeal, the employer's mailing address for purposes of this appeal with the Appeals Section has been modified to exclude the designation of Lynda McCalley, even as of the date of the hearing the Agency's employer database still shows that the "Attention:" field still shows "Lynda McCalley" for the employer's official address of record.

After a prior period of employment with the employer, the claimant most recently started working for the employer on March 22, 2011. She worked full time as a supported living technician. Her last day of work was November 26, 2012. The employer discharged her on that date. The reason asserted for the discharge was having negative interactions with coworkers and consumers.

The claimant had previously been given verbal warnings regarding negativity in June 2012 and on October 31, 2012; she had not previously been given any written warnings or specifically advised that her conduct was placing her job in jeopardy. On October 17 a new employee, Watkins, began working in the same house with the claimant. On November 14 Watkins reported to the site supervisor, Moore, that she found the claimant's interactions to be too negative, indicating that there had been an incident where Watkins instruction to a consumer had been undermined by the claimant with a negative inference toward Watkins, that the claimant had made comments suggesting consumers might be denied food, and that the claimant had referred to a consumer as "crazy." Moore began an inquiry into the matter, but did not speak to the claimant regarding the concerns until November 28. The only other intervening incident was that Watkins subsequently reported that the claimant was making comments blaming Watkins for a consumer's fall on or about November 16 which Watkins believed the claimant to be responsible. This also was not addressed with the claimant until November 28. The employer then determined to discharge the claimant on November 28.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the employer) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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 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 employer asserted that it did not make the change to designate “Lynda McCullen” as the “Attention:” person to whom mail was to be addressed. However, while the person who was making the changes on behalf of the employer may not have realized the full impact of the changes she was making in the employer’s official mailing information, it appears that the change was in fact made at the direction or by the action of a person on behalf of the employer. The record shows that the appellant did 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 not shown to be due to Agency error or misinformation or delay pursuant to 871 IAC 24.35(2), or other factor outside of the employer’s control. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative’s decision on the merits. 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 § 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). The question 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The gravity of the incident and the number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is having negative interactions with consumers and coworkers. However, conduct asserted to be disqualifying misconduct must be both specific and current. *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988); *West v. Employment Appeal Board*, 489 N.W.2d 731 (Iowa 1992). There is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8). The most recent incident in question occurred almost two weeks prior to the employer's discharge of the claimant. Further, 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 been effectively warned that continued issues could result in her discharge, and the gravity of the final issues was not of such a degree of severity so as to negate the need for warning.

The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 19, 2012 decision (reference 01) is affirmed. The appeal was not timely. Further, even if treated as 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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NOTE TO EMPLOYER:

If you wish to change your official mailing address of record on record with the Agency, including whether the official mailing address contains a specific person's name in the "Attention:" field, please access your account at: https://www.myiowaui.org/UITIPTaxWeb/.

Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY