IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHAD M RIKER Claimant **TRI-STATE NURSING ENTERPRISES INC** Employer	**APPEAL 21A-UI-01052-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/27/20** **Claimant: Appellant (2R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant/appellant, Chad. M. Riker, filed an appeal from the November 17, 2020 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 3, 2021. The claimant participated personally. His fiancé, Kristin Rodhe, attended as an observer. The employer, Tri-State Nursing Enterprises Inc., participated through Holly Kutz, Director of Nursing. Bridget Hoefling and Jennifer Schneiders also testified.

The administrative law judge took official notice of the administrative records. Department Exhibit D-1 was admitted. Claimant Exhibits A-C were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:
Did the claimant file a timely appeal?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time in occupational health beginning March 2, 2020 until separation occurred on October 2, 2020. The evidence is disputed as to whether the claimant quit or was discharged.

Prior to claimant's last day at work, his son had tested positive for COVID-19. His son splits time between the home of claimant and his mother. Claimant also began feeling sick.

Before October 2, 2020, claimant had no documented warnings. However, on the morning of October 2, 2020, Ms. Hoefling had verbally discussed claimant's 117 hours of unplanned absences in seven months of employment. Claimant acknowledged he had been absent a lot,

and cited to his son contracting COVID-19, his own illness and his son's grandmother dying as reasons for being absent approximately 14 days in seven months. Ms. Hoefling noted to Ms. Schneiders that claimant was observed "pouting" after their conversation.

Claimant stated he had arrived to work feeling sick on October 2, 2020 and continued to feel sick throughout his shift. Claimant decided he needed to go to the emergency room based upon his symptoms. He did not request permission to leave, but contacted his employer by email approximately two hours later while he was at the emergency room. Claimant had left his work issued laptop and keys at his work station, in addition to his personal backpack.

In an email to Ms. Hoefling, the claimant stated he wasn't feeling well, that he wasn't able to stay out of the bathroom, and had left to go to the emergency room. He said he understood if the employer had to let him go based upon prior attendance issues. Ms. Hoefling responded to claimant and they exchanged several messages. Ms. Hoefling first told claimant she accepted his resignation and he responded that he had not quit the employment. Ms. Hoefling indicated that claimant's walking off the job without permission, coupled with leaving his laptop and keys were evidence of his resignation. Ms. Hoefling stated to claimant "looks like you quit to me" even though he responded more than once that he had not intended to quit. Ms. Hoefling had another employee return the claimant's backpack to him at home that evening and separation ensued.

An initial unemployment insurance decision (Reference 01) resulting in a denial of benefits was mailed to claimant's last known address of record on November 17, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by November 27, 2020. November 27, 2020 was a state holiday and the next weekday was November 30, 2020. Accordingly, the appeal deadline was extended to November 30, 2020.

Claimant received the initial decision and called IWD. He was advised that appealing may impact his PUA application, so he did not immediately file his appeal. He filed his appeal upon receiving the PUA denial letter dated December 3, 2020. Claimant's appealed was filed on December 4, 2020. See Department Exhibit D-1.

REASONING AND CONCLUSIONS OF LAW:

The first issue to address is whether claimant's appeal is considered timely filed.

The law states that an unemployment insurance decision is final unless a party appeals the decision within ten days after the decision was mailed to the party's last known address. *See Iowa Code § 96.6(2).*

Iowa Admin. Code r. 871-24.35(2) provides:

> Date of submission and extension of time for payments and notices.
> (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 division 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 department 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, the division shall issue an appealable decision to the interested party.

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).

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The record shows that the claimant's delay in filing his appeal was based upon *Agency error or misinformation or delay or other action of the United States Postal Service* pursuant to Iowa Admin. Code r. 871-24.35(2). Because claimant was not given accurate advice by an IWD representative about the impact of filing an appeal on his PUA application, he was delayed in filing an appeal. The appeal is accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant did not quit the employment. Rather, the claimant was discharged, but not for disqualifying job-related misconduct.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code § 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code § 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section § 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the

burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the employer has the burden of proving that a claimant's department from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: Iowa Code section § 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. *Voluntary quitting.* If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a "termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Furthermore, voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5.

The credible evidence in this case does not support the claimant intended to resign from employment. Rather, claimant left work to go to the emergency room and in the process, left his laptop, his key, and her personal backpack. When the employer stated it had accepted his resignation, he repeatedly explained he had not intended to quit and was not resigning. The administrative law judge is not persuaded that claimant's reference in the email alerting the employer to his absence and saying "if you have to let me go, I understand" meant he wanted to leave the employment, but instead, acknowledged he had just been warned about absences that day and his leaving mid-shift may not be well-received.

When claimant repeatedly said he did not quit, Ms. Hoefling insisted he had and would not allow him to return. In this case at hand, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In this case, the claimant left work without permission.

The administrative law judge recognizes the claimant's leaving without permission would generally violate reasonable expectations that an employer has to know if an employee is unable to work or leaves work. However, it cannot be ignored that claimant left to go to the emergency room for himself (as opposed to tending to a personal or family issue) and that he did follow up with the employer within a reasonable period to let management know he had left and why he had left. The claimant has established sufficient evidence to mitigate his non-compliance with obtaining prior permission before leaving.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job-related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The unemployment insurance decision dated November 17, 2020, (reference 01) is REVERSED. The appeal is timely. The claimant did not quit the employment but was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

February 18, 2021
Decision Dated and Mailed

jlb/ol

NOTE TO CLAIMANT:

This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

If you do not qualify for regular unemployment insurance benefits due to disqualifying separations and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** More information about how to apply for PUA is available online at: www.iowaworkforcedevelopment.gov/pua-information

You may find information about food, housing, and other resources at https://covidrecoveryiowa.org/ or at https://dhs.iowa.gov/node/3250

Iowa Finance Authority also has additional resources at https://www.iowafinance.com/about/covid-19-ifa-recovery-assistance/