IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SASHA M REINDL
Claimant

SINDBERG/VEACH INC / DESIGNWORKS
Employer

APPEAL NO: 12A-UI-06705-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/29/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Sasha M. Reindl (claimant) appealed a representative's May 22, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Sindberg/Veach, Inc. / Designworks (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 2, 2012. The claimant participated in the hearing and was represented by Richard Piscopo, attorney at law. Penny Veach 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 or are there legal grounds under which it should be treated as timely?

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on May 22, 2012. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 1, 2012, a Friday. The appeal was not postmarked until June 4, 2012, which is after the date noticed on the disqualification decision.

The claimant wrote her appeal letter on June 1. She placed the appeal in a properly addressed and stamped envelope into a local United States Postal Service drop box in Dubuque on that

same date, before the last stated pick-up time that date. The appeal was not postmarked until Monday, June 4, but the administrative law judge notes that the postmark city is Cedar Rapids.

The claimant started working for the employer on April 11, 2011, although she had an extended period of absence and did not complete her training to go out onto the floor until August 3, 2011. She worked full-time as a cosmetologist and stylist at the employer's salon/spa. Her last day of work was April 24, 2012. The employer discharged her on that date. The reason asserted for the discharge was too many client complaints.

In a performance review on March 28 the claimant had been advised that the employer was receiving too many complaints about the claimant's coloring jobs and cuts. On April 23 the employer received two more complaints. One was a question of where the claimant had not shampooed the hair of a 17-year old girl and there had been a variance in the length of the cut from one side to the other. The claimant acknowledge that she had not shampooed the girl's hair, but reported that this was because the girl had indicated that she did not want to have her hair washed. The claimant acknowledged that this might have resulted in the lengths being somewhat in variance, but she did not have an opportunity to see the girl's hair when she came back in to see how bad the variance might have been, and did not have an opportunity to correct the cut. The second complaint that day was that the claimant had burned a client with the hot wax when doing a brow waxing, and that she had gotten the brows too short. The claimant denied that she had done this. It is unclear to whom this report might have been made, and the client did not come in to show the employer what the result might have in fact been.

Because of these two additional complaints after the reference in the performance review, the employer determined to discharge the claimant.

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

The administrative law judge concludes that the appellant's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to 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 § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

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 that 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 that 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 reason cited by the employer for discharging the claimant is, in essence, unsatisfactory job performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. There is no evidence the claimant intentionally failed to perform her duties to the best of her abilities. The mere fact that an employee might have various incidents of unsatisfactory job performance or multiple client complaints does not establish the necessary element of intent; misconduct connotes volition. *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, while the employer may have had a good business reason for discharging the claimant, the claimant's

actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The appeal in this case was timely. The representative's May 22, 2012 decision (reference 01) is reversed. 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.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/kjw